No. 85-2013

Supreme Court, U.S.
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In The
Supreme Court of the United States
OCTOBER TERM, 1986

JAMES J. CARRAS,
Petitioner,

v.

HULL AND SMITH HORSE VANS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a licensed motor common carrier can recover charges for the transportation of goods for which it lacks operating authority between the points the goods were transported?

(2) Whether the petitioner shipper has been denied due process of law by the state court of appeals when the respondent insisted at the trial and appellate level that he was pleading a quantum meruit action under state law; when the respondent represented to the federal court upon removal by the petitioner that it was pleading solely a state cause of action and said federal district court remanded the action upon this basis; and when the Michigan Court of Appeals found that even though the respondent insisted that it was a state cause of action the fact that respondent's president testified in support of what would be reasonable charges that he based same on joint rates, respondent had complied with federal law despite the fact that respondent had no operating authority between the points the goods were transported?

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vs.

HULL AND SMITH HORSE VANS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is officially reported at 144 Mich App 712 and is set forth in Appendix A, *infra*, p 1a.

JURISDICTION

The final order of the Appeals Court of Michigan was made and entered (Appendix A) on August 6, 1985.

By its decision made on March 18, 1986, the Supreme Court of Michigan denied without opinion petitioner's timely application for leave to appeal such judgment (Appendix B, infra).

The jurisdiction of this Court is invoked under 28 USC sec 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 206. [August 9. 1935, amended June 29, 1938, September 18, 1940, September 1, 1950, July 12, 1960, October 15, 1962.] [49 U.S.C. section 306.] (a)(1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations:

Sec. 208. [August 9, 1935, November 10, 1966] [49 U.S.C. section 308.] (a) Any certificate issued under section 206 and 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between

fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6):

Sec. 217. [August 9, 1935, amended September 18, 1940.] [49 U.S.C. section 317.] (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(d) No common carrier by motor vehicle, unless otherwise provided by this part, shall engage in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have

been filed and published in accordance with the provisions of this part.

49 U.S.C. section 10921. Except as provided in this subchapter or another law, a person may provide transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter II, III, or IV of chapter 105 of this title or be a broker for transportation subject to the jurisdiction of the Commission under subchapter II of that chapter, only if the person holds the appropriate certificate, permit, or license issued under this subchapter authorizing the transportation or service. Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1409.

49 U.S.C. section 10922. (c)(1) Subject to section 10927(a) of this title, each certificate issued to a person to provide transportation as a motor common carrier shall specify —

(A) the transportation to be provided by the carrier;

(B) any of the regular routes over which, any of the places between which, and off-route places at which, the carrier may provide transportation; and

(C) if transportation is not over regular routes or between specified places, the area in which the carrier may provide transportation.

49 U.S.C. section 10762. (a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under

this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

STATEMENT OF THE CASE

Respondent motor common carrier sued the petitioner in the 74th Judicial District Court for Bay County, Michigan on the basis of an account stated for the transportation of racehorses. Petitioner removed the action upon the basis that a federal question was involved. The United States District Court for the Eastern District of Michigan, Northern Division remanded the case upon the representation that respondent had pleaded a state cause of action. (Appendix C p 11a Memorandum Opinion and Order). The same cause of action was again instituted in the Bay County Circuit Court for the State of Michigan.

Respondent again pleaded a state cause of action except this time it was based upon quantum meriut (Appendix D p 14a Third Amended Complaint and Affidavit).

Petitioner timely raised the defense that federal law preempted the cause of action and that any charges were illegal because the transportation was unauthorized by respondent's operating authority. (Appendix E p 29a First Amended Answer and Affirmative Defenses To Third Amended Complaint and Affidavit). Respondent admitted that the transportations were unauthorized by their operating authority. (Appendix F p 39a Request For Admission Of Facts And Genuineness Of Documents and Appendix G p 42a Response To Request For Admission Of Facts And Genuineness Of Documents).

Bay County Circuit Judge Eugene C. Penzien rendered an oral opinion that petitioner failed to state a valid defense to respondent's claim and granted to respondent summary judgment (Appendix H p 45a Motion To Strike Affirmative Defenses and Appendix I p 48a Order For Partial Summary Judgment). The basis for the state trial judge Eugene C. Penzien's decision was the case of *Ets-Hokin & Galvan, Inc.*, v *Maas Transport, Inc*, 380 F2d 258 (CA8 1967) cer den 389 US 977, 19 LEd2d 471, 88 SCt 481. (Appendix H p 45a Motion To Strike Affirmative Defenses).

The case was tried before a jury in Saginaw County, Michigan, Saginaw County Circuit Judge Joseph R. McDonald presiding. The case was submitted to the jury on the theory that respondent had pleaded a state quantum meruit action and that petitioner had no defenses to this cause of action except as to the reasonableness. (Appendix J p 50a Orders Granting Summary Judgment).

The Saginaw County Circuit Court Judge Joseph R. McDonald entered a judgment of Twenty Thousand Seven Hundred Ninety-seven ($20,797.85) dollars and 85/100 plus interest from the date of the filing of the complaint, plus costs to be taxed (Appendix K p 54a Judgment). Judge McDonald on July 6, 1984 entered an Order for reasonable attorney fees and expenses of proof in the amount of Sixteen Thousand Six Hundred Sixty-four ($16,664.50) dollars and 50/100. (Appendix L p 56a Order For Reasonable Attorney Fees And Expenses of Proof).

Petitioner timely appealed the case to the Michigan Court of Appeals. Petitioner again raised the federal law issue that the cause of action was pre-empted by federal law (Appendix M p 58a Statement Of Questions Involved Question II). The Michigan Court of Appeals on August 6, 1985 affirmed the actions of the trial court, found by implication that the utilization by respondent's president of the tariffs of other motor

common carriers satisfied federal law somehow, and adopted the decision of *Ets-Hokin & Galvan Inc* v *Maas Transport supra* as being controlling (Appendix A p 1a Opinion and Order) on the federal issue.

Petitioner took application for leave to appeal to the Supreme Court of Michigan which denied same on the basis that they were not persuaded that the questions presented by petitioner should be reviewed by them (Appendix B p 9a Order).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE MICHIGAN COURT OF APPEALS CONFLICTS WITH OTHER DECISIONS OF THE FEDERAL COURT OF APPEALS ON THE RIGHT TO RECOVER ILLEGAL CHARGES.

There are numerous federal cases which hold that a common carrier cannot recover charges when there is illegal carriage off route. *Mars Express, Inc.* v *David Masnik, Incorporated*, 401 F2d 891, 894 (CA2 1968); *Fry Trucking Co.* v *Shenandoah Quarry, Inc*, 628 F2d 1360, 1363 (CA DC 1980); *NYAD Motor Freight, Inc* v *W.T. Grant Company*, 350 FSupp 692 (SD Ny 1972); and *Motor Common Carriers of Property, Routes and Service* 119 MCC 170, 178 (1973).

Petitioner was not able to find any United States Supreme Court directly on point, however it is submitted that the rationale of this Court's recent holding in *Southern Pacific Transportation Co* v *Commercial Metals, Co*, 456 US 336, 721 LEd2d 114, 102 SCt 1815 (1982) supports the position contended by petitioner. *Southern Pacific Transportation Co* v *Commercial Metals*

Co supra involved lawful rates being collected. There were no lawful rates nor legal rates here since the entire carriages were unauthorized. These were not mere technical violations. They were an arrogant and flagrant violation of the law and it did not occur once but five times. To say under the circumstances here that the remedies for a carrier's violations of regulations are best left to the ICC for such resolution as it thinks proper is to leave a shipper with no real remedy. Petitioner suggests to the Court that in real economic effect the regulators may be run by the regulated.

Petitioner further suggest that respondent in its deliberate and repeated attempts to claim a state cause of action when it knew or should have known that federal law had pre-empted any cause of action that it may have had warrants a federal holding of a forfeiture of any freight charges. The case here smacks of racketeering tactics employed against petitioner.

Whether the Court is willing to state a broad rule on the forfeiture of freight charges for an inadvertent or random illegal carriage it would seem that when the illegal carriages are neither random nor inadvertent as here a remedy of forfeiture would encourage carriers to follow the rules and regulations of the ICC. See *East Coast Moving & Storage, Inc* v *Mark Flappin*, 78 Misc 2d 140 (1974); *Central RR of New Jersey* v *United States Pipe Line Co*, 1 F2d 866, 868, 870 (CA3 1924) and *Hewitt-Robbins* v *Eastern Freight-Ways*, 371 US 84, 88, 9 LEd2d 142, 83 SCt 157 (1968) which states different principles apply where motor carriers and routing is involved.

II.

THE MICHIGAN COURT OF APPEALS AND THE TRIAL COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND THE SUPREME COURT OF MICHIGAN HAS SANCTIONED SUCH DEPARTURES BY ITS LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This is a case where fraud on the court was not practiced but instead fraud with the court was practiced on petitioner. Petitioner recognized that there is no federal constitutional right to consistent state decisions. *Ohio Ex Rel Bryant* v *Akron Metrop Pk District*, 281 US 74, 81, 74 LEd2d 710, 50 SCt 228 (1980).

Petitioner was not given an adequate opportunity to present a defense when the lower court held that the affirmative defenses based upon federal law were not valid as a matter of law because respondent had rightfully pleaded a state law cause of action. When the case was appealed to the Michigan Court of Appeals the Michigan Court of Appeals said respondent you are right but you still lose because we are going to hold that respondent's president testimony that he based his charges on rates by motor common carriers was sufficient whether or not there was a lawful and legal published rate on file with the ICC and even though respondent had made illegal carriages. It is truly outrageous. The opinion of the Michigan Court of Appeals reads more in the nature of an advocate's brief except for the gratuitous slap against both petitioner and respondent's attorney. The net effect of this whole proceedings in the Courts of Michigan has been to punish the innocent (meaning Petitioner) and to reward the guilty (Respondent). *American Surety Co* v *Baldwin*, 287 US 156, 167,

77 LEd 231, 53 SCt 98 (1932) states that due process is satisfied when appellate procedures afford an adequate opportunity to present every available defense. See also *Ohio Bell Telephone Company* v *Public Utilities Com*, 301 US 292, 302, 81 LEd 1093 (1936) and *Saunders* v *Shaw*, 244 US 317, 320, 61 LEd 1163 (1917).

This has not been the case in the lower courts of Michigan nor in the appellate courts of Michigan.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Michigan Court of Appeals.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

STATE OF MICHIGAN
COURT OF APPEALS

HULL AND SMITH HORSE VANS, INC.,
a foreign corporation,
Plaintiff-Appellee,

v No. 78211

JAMES J. CARRAS,
Defendant-Appellant.

BEFORE: R.B. Burns, P.J., and J.H. Shepherd and B.A. Jasper*, JJ. PER CURIAM

Plaintiff brought this action to recover the costs of transporting defendant's racehorses on four separate occasions between 1978 and 1980. Plaintiff also sought recovery for the boarding of two of the horses in California for over two years following defendant's refusal to pay the transportation charges. The jury found for plaintiff. The trial court entered judgment for plaintiff of $20,797.85 with interest on February 28, 1984. On April 16, 1984, the court ordered defendant to pay plaintiff's "actual costs", including attorney fees, which were necessitated by defendant's refusal of the mediation award. GCR 1963, 316.7. Defendant appeals as of right. We affirm.

Each of the four transactions entailed transportation of the horses in interstate commerce. Plaintiff admitted that it lacked a "certificate of public convenience and necessity" to cover the routes for these four shipments. Defendant attempted to affirmatively defend on this ground. Since the Interstate

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* Recorder's Court Judge, sitting on the Court of Appeals by assignment.

Commerce Commission (ICC) had not issued certificates to plaintiff, plaintiff had violated federal law. 49 USC 10921. According to defendant, this violation rendered the shipping contracts void for illegality and barred plaintiff's recovery. The trial court granted plaintiff's motion for summary judgment on this affirmative defense, concluding that enforcement of the Interstate Commerce Act, 49 USC 10101 *et seq*, was a federal matter, and that plaintiff's violation of the Act did not bar recovery.

The jury's calculation of plaintiff's damages mirrors that urged by plaintiff in its complaint and at trial. In turn, plaintiff's figures for the transportation costs match those found in the standard rate schedule of the National Horse Carriage Association in force at the time of these four transactions. Plaintiff entered these figures on the bills of lading for the four shipments of defendant's horses. The rate schedule was approved by the ICC.[1] Therefore, plaintiff's recovery for the transportation costs equals what it would have received if defendant had paid in the first place. Moreover, the rates approved by the Commission are the only rates allowed under federal law. *United Gas Pipe Line Co* v *Mobil Gas Service Corp*, 350 US 332, 338; 76 S Ct 373; 100 L Ed 373, 383 (1956). Thus, plaintiff recovered the same amount to which it would have been entitled if it had possessed the applicable interstate certificates or tariffs. "A carrier's claim is, of necessity, predicated on the tariff — not on understanding with the shipper." *Thurston Motor Lines, Inc* v *Jordan K. Rand, Ltd*, 460 US 533, 535; 103 S Ct 1343; 75 L Ed 2d 260, 262-263 (1983).

Nevertheless, at trial plaintiff wasted much effort by advancing a *quantum meruit* theory of recovery. Plaintiff claimed it was

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[1] See, 49 USC 10706(b). Rate agreements approved by the Commission are not actionable under the antitrust laws. *Board of Trade of City of Chicago* v *ICC*, 646 F2d 1187 (CA 7, 1981).

entitled to be paid a reasonable amount for the transportation of the horses and submitted extensive proof of the reasonableness of the standard rates, in light of the costs of fuel, insurance, salaries and a reasonable profit. Defendant argued that the services rendered were valueless, for various reasons we need not mention here. Plaintiff's effort was unnecessary because, as noted above, the rates approved by the ICC are the sole rates permitted. This Court has stated on numerous occasions that "*quantum meruit* as a theory of recovery is inapplicable where an express contract exists." *The Hayman Co* v *Brady Mechanical, Inc*, 139 Mich App 185, 191; ____ Mich App ____ (1984), *LeZontier* v *Shock*, 78 Mich App 324, 331; 260 NW2d 85 (1977). We believe it is also inappropriate where the price in the agreement is imposed by law, in this case by the ICC.

The trial court rejected defendant's contention that the contracts were unenforceable. Plaintiff's recovery was limited by the amounts set forth in the rate schedule. Otherwise, a carrier might be able to reap an enhanced profit from the illegality of its own conduct. At oral argument, plaintiff's attorney opined that the carrier might recovery an amount greater than that allowed by the rate schedule, by employing a *quantum meruit* theory in cases in which the carrier lacked an applicable interstate tariff. We reject this view.

In this case, however, plaintiff recovered the same amounts as were dictated by the ICC through its approval of the rate schedules. The jury was convinced that these amounts represented the reasonable value of the transportation services, despite defendant's assertions that plaintiff's services lacked value. This measure of damages yielded the same result as direct application of the schedule itself.

Defendant raises five issues to support his position, none of which has merit.

First, defendant renews his argument that the contracts were invalid and unenforceable because plaintiff had no applicable interstate tariff or certificate for the four routes on which the animals were carried. In *Ets-Hokin & Galvin, Inc* v *Maas Transport, Inc*, 380 F2d 258 (CA 8, 1967), plaintiff sued to recover the costs of transporting cable manufactured in Texas for installation at a missile complex in North Dakota. A federal district court had previously ruled that transportation of such cable was interstate commerce.[2] The defendant argued that, since the plaintiff had no applicable interstate tariff, its contract with plaintiff was illegal and unenforceable. The United States Court of Appeals disagreed:

> "A contract in violation of a statutory provision generally is void or illegal only if the legislative body enacting the statute evidences an intention that such contracts be considered void or illegal. See, e.g., *McCullough Transfer Co* v. *Virginia Sur. Co.*, 213 F.2d 440 (6th Cir. 1954); *Macco Const. Co. v. Farr*, 137 F.2d 52 (9th Cir. 1943); *Guffey-Gillespie Oil Co. v. Wright*, 281 Fed. 787 (8th Cir. 1922); *Talco Capital Corp. v. Canaveral Int'l Corp.*, 225 F.Supp. 1007 (S.D. Fla. 1964); 17 C.J.S. §202 at 1007 (1963); otherwise, even though the parties to a contract may be subject to a statutory penalty as the result of performing a contract, the contract itself remains in full force and effect. In the instant case, Maas was in violation of the Motor Carrier provisions of the Interstate Commerce Act when it transported cable under its contract with Ets-Hokin and was subject to penalties for such violations. The cable transportation contract itself, however, would be void, illegal or unenforceable only if Congress, in passing the Motor Carrier provisions of the Interstate

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[2] *Great Northern Ry* v *Thompson*, 222 F Supp 573 (D ND, 1963).

> Commerce Act, intended that contracts resulting in violations of that portion of the Act be illegal and void. A review of the statutory provisions involved herein reveals no congressional intention to make contracts in violation thereof void or illegal. The contract between Ets-Hokin and Maas was valid and enforceable."

In this case, plaintiff may have been subject to civil and criminal penalties for its repeated violations of the certificate requirement, 49 USC 10921, 11901 *et seq*, but the contracts remained valid and enforceable. Defendant refers to *Arkansas Louisiana Gas Co* v *Hall*, 453 US 571; 101 S Ct 2925; 69 L Ed2d 856 (1981), as an intance in which the Court held unapproved charges illegal and unenforceable. In *Hall*, the plaintiff sued to recover under a contract for sale of natural gas. The contract provided that the price would increase if the seller had to pay a higher price for the gas. 69 L Ed2d, 861. The United States Supreme Court held that the seller could not recover the difference between the original price and the subsequently increased price. This holding was an application of the "filed rate doctrine," which "prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Federal Energy Regulatory Commission pursuant to the Natural Gas Act," 15 USC 717 *et seq*. 69 L Ed2d, 861.

Under the Interstate Commerce Act, there is no "filed rate," but only the rate approved by the Commission. *United Gas Pipe Line*, *supra*. There was no deviation from the mandated rate in this case. The price terms of the contracts contained nothing inconsistent with federal requirements. Compare, *Farley Terminal Co* v *Atchison, Topeka & Santa Fe Ry. Co*, 522 F2d 1095 (CA 9, 1975). Also inapposite are cases in which the United States Supreme Court held recovery barred because the contract provided for performance of a service in addition to or different than the service which is the basis for the approved rate. *Davis* v *Cornwell*, 264 US 560; 44 S Ct 410;

68 L Ed 848 (1924), *Chicago & Alton R. Co* v *Kirby*, 225 US 155; 32 S Ct 648; 56 L Ed 1033 (1912).

Defendant's next claim involves the disqualification of the original trial judge. The original judge denied defendant's motion for disqualification. The issue of disqualification was referred to the State Court Administrator for assignment to another judge. GCR 1963, 912.3(c)(2). The assigned judge granted defendant's motion for disqualification of the trial judge, concluding that, due to the trial judge's past dealings with defendant (an attorney), "there might be some appearance of impropriety" if the judge were allowed to continue. However, the circuit judge who granted the motion found "no reason to doubt" the trial judge's statement "that he could sit on this matter and serve impartially."

Defendant now argues that all orders entered by the trial judge prior to this disqualification are void. We disagree. There was no finding that the judge was personally biased or prejudiced against defendant. GCR 1963, 912.2(a)(2). The assigned judge disqualified him because of a possible appearance of impropriety. The basis for disqualification was not so serious as to render the judge's prior rulings void. *Brill* v *Brill*, 75 Mich App 706, 711; 255 NW2d 739 (1977). In addition, defendant fails to specify how the original judge's rulings affected the outcome. Defendant was free to assign error to any of these decisions. The most significant of the rulings, the grant of summary judgment on defendant's affirmative defense grounded in federal law, was correct. *Ante*.

Next, defendant argues that the judge assigned to preside at trial acted unfairly toward him. Defendant devotes 60 pages of his brief[3] to excerpts from the transcript which, he urges,

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[3] This one section of defendant's brief would now exceed the 50-page limitation set forth in MCR 1985, 7.212(B). Since this rule was not in effect when defendant's brief was filed, no criticism of defendant is implied. Attorneys are reminded of the rule for future cases.

show that the trial judge prevented him from presenting his case. We have reviewed those portions of the transcript and have found no unfair treatment of defendant by the trial court. *Rushing* v *Wayne County*, 138 Mich App 121, 149; 358 NW2d 904 (1984), *Ferrell* v *Vic Tanny International, Inc*, 137 Mich App 238, 247-248; 357 NW2d 669 (1984).

Defendant also complains that plaintiff's attorney acted improperly. According to defendant, counsel for plaintiff engaged in "outrageous conduct" and "showed nothing but contempt for the rules of procedure and propriety." From defendant's brief, we cannot discern whether defendant was victimized by a pattern of misconduct, since he advances this claim without a single reference to the record. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims." *Mitcham* v *Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). See also, *Beaumont* v *Brown*, 125 Mich App 464, 466; 336 NW2d 26 (1983).

Finally, defendant challenges the order for costs and attorney fees on three grounds. The first, that the original order assigning the case to a mediation panel is void because the judge was later disqualified, is dealt with elsewhere in this opinion.

Secondly, defendant argues that the attorney fees award is excessive, according to the guidelines adopted by the Supreme Court in *Wood* v *DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). We have examined the hourly rates applied by the trial court and the number of hours allowed, in light of the factors listed in *Wood*, *supra*.[4] The trial court did not abuse its discretion. *Petterman* v *Haverhill Farms, Inc*, 125 Mich App 30, 32;

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[4] The professional standing and experience of the attorney; the skill, time and labor involved; the result of the trial; difficulty of the case; expenses incurred; and the nature and length of the relationship with the client. *Id.*

335 NW2d 710 (1983). It is noteworthy that defendant did not even appear at the hearing on plaintiff's motion for actual costs, much less challenge the reasonableness of the award in the trial court. At oral argument, defendant, an attorney representing himself, stated that he failed to appear for the hearing on costs and attorney fees because he assumed that the result was a foregone conclusion and that he had no chance of prevailing. Defendant knows as an attorney that one purpose of a hearing in the trial court is to make a record so that the case can be reviewed by an appellate court. When a party deliberately fails to appear, we have nothing to review unless an error of the trial court is self-evident from the record. Such is not the case here.

Thirdly, defendant argues that GCR 1963, 526.10(1) requires the court to tax costs when the court signs the judgment, not later. We believe the court may tax the costs at a later date. Indeed, costs are "rarely" taxed when judgment is entered, because "the supporting data needed to tax costs is not usually gathered until the prevailing party is determined." 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 91. Furthermore, the mediation rule specifically requires that the reasonable attorney fee be "determined by the trial judge." GCR 1963, 316.8; MCR 1985, 2.403(O)(3). It would make no sense to forestall entry of the judgment until the court is ready to decided the amount of the attorney fee award.

Affirmed.

/s/ Robert B. Burns
/s/ John H. Shepherd
/s/ Beverley A. Jasper

APPENDIX B

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 18th day of March in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable

G. MENNEN WILLIAMS,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

77141

HULL AND SMITH HORSE VANS, INC.,
a Foreign Corporation,
Plaintiff-Appellee,

v

JAMES J. CARRAS,
Defendant-Appellant.

SC: 77141
COA: 78211
LC: 80-4283

On order of the Court, the application *in propria persona* for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a

true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 18th day of March in the year of our Lord one thousand nine hundred and eighty-six.

[SEAL]

/s/ CORBIN R. DAVIS Clerk.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

HULL AND SMITH HORSE VANS, INC.,
a foreign corporation,
Plaintiff,

v

JAMES J. CARRAS,
Defendant.

CIVIL ACTION
NO: 80-10055

MEMORANDUM OPINION AND ORDER

At a session of said court, Held in the Federal Building, Bay City, Michigan on May 13, 1980
PRESENT: HONORABLE JAMES HARVEY
United States District Judge

On March 21, 1980, plaintiff Hull and Smith Horse Vans, Inc. filed a complaint against defendant James J. Carras, in the 74th District Court, Bay City, Michigan seeking recovery on an account allegedly due and owing to it.

Defendant filed a timely petition for removal to this Court on April 3, 1980. The matter is before the Court on plaintiff's motion for remand. The general removal statute provides in pertinent part as follows:

> "(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be

removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

As the case authority interpreting this statute makes very clear, if a petition for removal is based on a defendant's assertion that a federal question is involved, the federal question must be presented by plaintiff's complaint as it stands at the time the petition for removal is filed in order to confer the federal court with proper removel jurisdiction. *LaChemise Lacoste* v *Alligator Co*, 506 F2d 339 (CA 3, 1974), *cert denied* 421 US 937, 95 S Ct 1666, 44 L Ed 2d 94, *reh denied* 421 US 1006, 95 S Ct 2408, 44 L Ed 2d 674 (1975).

Further, removal jurisdiction cannot be conferred upon the Court when a federal question has been raised as a matter of defense or as a counterclaim. See 14 Wright-Miller-Cooper, *Federal Practice and Procedure*, Section 3722, p. 559 and cases cited therein.

Upon close examination of the plaintiff's complaint as originally filed, the Court cannot ascertain the existence of any federal question which could confer removal jurisdiction upon this Court. *Gully* v *First National Bank in Meridian*, 299 US 109, 57 S Ct 96, 81 L Ed 70 (1936).

Even with reference to defendant's petition for removal and other pleadings filed in this cause, which the Court is not obligated to consider, it is clear, notwithstanding defendant's assertions as to the existence of a federal question involving interstate commerce, that plaintiff has elected to assert only a state claim, as he may properly do, and his complaint embraces no action dependent on the Interstate Commerce Act, 49 USC §§ 1 et seq. *Kysor Industrial Corp* v *Pet, Inc*, 459 F2d 1010 (CA 6, 1972); *Jury-Rowe Co of Lansing, Michigan* v *Teamsters & Chauffeurs Local Union No 580*, 97 F Supp 633 (ED Mich, 1951). Removal cannot, therefore, be achieved on this basis.

Additionally, defendant's vague and ambiguous counterclaims and defenses alleging the deprivation of his constitutional and civil rights by plaintiff and numerous other parties not joined in this suit simply cannot serve as a basis for removal jurisdiction of this contract action between two private parties. *Roth Packing Co* v *Becker*, 530 F2d 1295 (CA 9, 1975).

As a final matter, no other proper basis is apparent in any of these pleadings to confer either removal or original jurisdiction upon this Court.

Accordingly, for the reasons stated above, the Court hereby GRANTS plaintiff's motion and REMANDS this action to the State Court from which it is removed. All other outstanding motions in this action are hereby DENIED as moot.

IT IS SO ORDERED.

/s/ JAMES HARVEY

JAMES HARVEY
United States District Judge

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

HULL AND SMITH HORSE VANS, INC.,
a Foreign Corporation,
Plaintiff,

File No. 80-4283

vs.

Honorable
Eugene Penzien

JAMES J. CARRAS,
Defendant.

THIRD AMENDED COMPLAINT AND AFFIDAVIT

STATE OF NEBRASKA)
COUNTY OF SAUNDERS) ss.

GENE HULL, President of HULL AND SMITH HORSE VANS, INC., Plaintiff, having knowledge of the facts, being duly sworn, says as follows:

GENERAL ALLEGATIONS

1. That Plaintiff is a foreign corporation authorized to do business in Michigan, engaged in hauling horses for hire.

2. Defendant JAMES J. CARRAS is a resident of Bay County, Michigan.

3. On five different occasions from November, 1976, to June, 1978, Defendant JAMES J. CARRAS contacted Plaintiff, HULL AND SMITH HORSE VANS, INC. to haul certain of his horses to locations around the country, and paid for this service by check. These five transfers were:

a) November 1, 1976	Livonia, Michigan — Hot Springs, Arkansas
b) October 21, 1977	Metamora, Michigan — Waterloo, Nebraska
c) November 29, 1977	Detroit, Michigan — Waterloo, Nebraska
d) April 22, 1978	Waterloo, Nebraska — Detroit, Michigan
e) May 7, 1978	Waterloo, Nebraska — Detroit, Michigan

See Exhibit "A", attached hereto.

COUNT I

Plaintiff realleges the General Allegations 1-3, incorporating the same herein by reference, and further says:

4. On or about June 27, 1978, Defendant JAMES J. CARRAS contacted Plaintiff HULL AND SMITH HORSE VANS, INC., and requested that Plaintiff transport fourteen of his horses from Waterloo, Nebraska to Chesapeake, Maryland, for a fee.

5. Pursuant to this request, six of Defendant's horses were transported from Jackson's Thoroughbred Farm in Nebraska on or about June 27,. 1978, and Defendant, JAMES J. CARRAS paid by check for this service.

6. On or about October 27, 1978, Plaintiff HULL AND SMITH HORSE VANS, INC., acting pursuant to Defendant, JAMES J. CARRAS', request, transported the remaining eight horses from Jackson's Thoroughbred Farm in Waterloo, Nebraska, to Chesapeake, Maryland.

7. When Defendant's horses arrived in Chesapeake, Maryland, they were received in apparent good order by one JOANNE K. SZYMANSKI.

8. The total charge for this service was $1,668.00, which Defendant JAMES J. CARRAS has refused and neglected to pay, despite being requested to do so, and despite being sent a copy of his account. (See Exhibits "B" and "F", attached hereto)

9. At no time prior to filing suit, has Defendant JAMES J. CARRAS objected to this charge.

WHEREFORE, Plaintiff, HULL AND SMITH HORSE VANS, INC. prays for Judgment in the amount of $1,668.00 for Count I, with costs, interest and attorney fees.

COUNT II

Plaintiff realleges the General Allegations 1-3, incorporating the same by reference, herein, and further says:

10. On or about April 5, 1979, Defendant JAMES J. CARRAS or his agent, contacted Plaintiff, HULL AND SMITH HORSE VANS, INC. and requested that Plaintiff transport thirteen of his horses from Chesapeake City, Maryland, to Fenton, Michigan, for a fee.

11. Pursuant to this request, thirteen of Defendant's horses were transported from Lochraven Farm in Chesapeake City, Maryland, to Fenton, Michigan, on or about April 5, 1979.

12. When Defendant's horses arrived in Michigan, they were received in apparent good order by Defendant JAMES J. CARRAS.

13. The total charge for this service was $1,736.00, which Defendant, JAMES J. CARRAS, has refused and neglected to pay, despite being requested to do so, and despite being sent a copy of his account owing to Plaintiff. (See Exhibits "C" and "F", attached hereto)

14. At no time prior to commencing suit has Defendant, JAMES J. CARRAS, objected to this charge.

WHEREFORE, Plaintiff, HULL AND SMITH HORSE VANS, INC., prays for judgment in the amount of $1,736.00 for Count II, with costs, interest, and attorney's fees.

COUNT III

Plaintiff realleges the General Allegations 1-3, incorporating the same herein by reference, and further says:

15. On or about April 7, 1979, Defendant, JAMES J. CARRAS or his agent contacted Plaintiff, HULL AND SMITH HORSE VANS, INC., and requested that Plaintiff transport five of his horses from Philadelphia, Pennsylvania, to Detroit, Michigan, for a fee.

16. Pursuant to this request, five of Defendant, JAMES J. CARRAS' horses were transported from Keystone Race Track in Philadelphia, to Detroit, Michigan on or about April 7, 1979.

17. When Defendant's horses arrived in Michigan, they were received in apparent good order by Defendant, JAMES J. CARRAS.

18. The total charge for this service was $894.40, which Defendant JAMES J. CARRAS has refused and neglected to

pay, despite being requested to do so, and despite being sent a copy of his account owing to Plaintiff. (See Exhibits "D" and "F", attached)

19. At no time prior to filing suit has Defendant, JAMES J. CARRAS, objected to this charge.

WHEREFORE, Plaintiff HULL AND SMITH HORSE VANS, INC., prays for Judgment in the amount of $894.40 for Count III, with costs, interest and attorney fees.

COUNT IV

Plaintiff realleges the General Allegations 1-3, incorporating the same herein by reference and further says:

20. On or about January 27, 1980, Defendant's agent, one RAY PRIDDY, acting within the scope of his authority, contacted Plaintiff, HULL AND SMITH HORSE VANS, INC, and requested Plaintiff firm to transport two of Defendant's horses from Detroit, Michigan, to Inglewood, California, for a fee. These two horses are "Voice Sound" and "Po Bear".

21. Pursuant to this request, Plaintiff, through its principal WILLIAM SMITH, arranged with one Cross-Tie Horse Vans, Inc. a Michigan Corporation, for Cross-Tie to pick up the two horses at Detroit, Michigan, and transport them to Toledo, Ohio.

22. In Toledo, Ohio, Cross-Tie Horse Vans, Inc. transferred Defendant's two horses named above to Plaintiff HULL AND SMITH HORSE VANS, INC., to be transported from there to Hollywood Park Race Track at Inglewood, California.

23. When Defendant, JAMES J. CARRAS' horses arrived in California, they were received in apparent good order by

one FRED HAYES, and Defendant, JAMES J. CARRAS, was notified of the charge for transport.

24. The total charge for this service was $1,482.45, which Defendant JAMES J. CARRAS has refused and neglected to pay, despite being requested to do so, and despite being sent a copy of his account owing to Plaintiff. (See Exhibit "E" and "F", attached)

WHEREFORE, Plaintiff HULL AND SMITH HORSE VANS, INC., prays for Judgment in the amount of $1,482.45 for Count IV, with costs, interest and attorney fees.

COUNT V

Plaintiff realleges the General Allegations 1-3, incorporating the same herein by reference, and further says:

26. On or about January 27, 1980, pursuant to the request of Defendant, JAMES J. CARRAS, or his agent, Plaintiff transported two of Defendant's horses from Toledo, Ohio, to Inglewood, California.

27. The total charge for this service $1,482.45; Defendant JAMES J. CARRAS has refused to pay this amount despite repeated requests to do so. (See Exhibit "E", attached)

28. As a result of Defendant's refusal to pay the transportation charges for this service, Plaintiff has been forced to care for the two horses, "Voice Sound" and "Po Bear", since February 1, 1980, with attendant grazing, stable, and veterinarian fees paid by Plaintiff.

29. The reasonable daily board charges for these two horses are $8.00 per day per horse, for a total bill as of June 1, 1981, of $9,680.00; the reasonable veterinarian bills to June 1, 1981, total $66.00. Both charges are continuing at present.

30. Plaintiff HULL AND SMITH HORSE VANS, INC. has attempeted since April 11, 1980, to deliver these two horses to Defendant JAMES J. CARRAS, in return for paying the transportation and maintenance charges for them alone, but Plaintiff,s offer in this regard has been rejected by Defendant.

WHEREFORE, Plaintiff HULL AND SMITH HORSE VANS, INC., prays for a judgment in the amount of $9,746.00 for Count V, with costs, interest and attorney fees.

FURTHER, Plaintiff HULL AND SMITH HORSE VANS, INC., prays for an aggregate judgment in excess of $10,000.00 for Counts I, II, III, IV, and V, with an award of costs, interest, and attorney's fees.

/s/ GENE HULL

GENE HULL, Plaintiff

On this 23rd day of September, 1981, before me the undersigned, a Notary Public, duly commissioned and qualified for and in said County, personally came Gene Hull, President of Hull and Smith Horse Vans, Inc., a corporation, to me known to be the indentical person whose name is affixed to the foregoing Complaint and Affidavit and acknowledged the execution thereof to be his voluntary act and deed as such officer and the voluntary act and deed of said corporation and that the corporate seal of said corporation was thereto affixed by its authority.

Witness my hand and notarial seal the day and year last above written.

/s/ CHARLES J. EGR

Notary Public

Prepared By:
DAVID F. OEMING, JR. (P23735)
Attorney at Law
2510 State Street
Saginaw, Michigan 48602
Telephone: (517) 799-2660

AUTHENTICATION

I, Gladys Pearson, Clerk of Saunders County, District Court, do hereby certify that Charles Egr by whom the above attestation was made, was, at the date thereof, a notary public in and for the state of Nebraska, County of Saunders, duly qualified and acting.

In witness hereof, I have hereunto set my hand and affixed the seal of said court at the City of Wahoo County of Saunders, this 23rd day of September 1981.

/s/ Gladys Pearson

Clerk of the District Court

/s/ DAVID F. OEMING, JR.

DAVID F. OEMING, JR. (P23735)
Attorney at Law
2510 State Street
Saginaw, Michigan 48602
Telephone: (517) 799-2660

HULL and SMITH
HORSE VANS, INC.
PHONE (402) 944-9505 3357
ROUTE 1
ASHLAND, NEBR. 68003
I.C.C.—MC-115663
N.S.R.C.— M-11854

J.J. CARRAS
2903 BOY SCOUT ROAD
BAY CITY, MICH 48706

DATE	DESCRIPTION	CHARGES	CREDITS	BALANCE
	1974 Balance Forward			-0-
11/1/76	(3)LIVONIA, MICH-HOT SPRINGS,AR Swinging Flight, Dutch Law Sutup @134.00 each	402.00		402.00
11/24/76	Paid by check		402.00	-0-
10/21/77	(15)METAMORA MI-WATERLOO NE	1901.25		1901.25
10/22/77	"Automatic Spen" "Major Line" (@) 126.75 ea. "Ginger Quick" "Ichiban" "Piousha" "Marg Hood" "Paloupee" "Dutch Law" "Swinging Flight" "Canyon Music" "I'm not koking" "Chubby Checks" 3 wearlings			
11/29/77	(1)DETROIT MI-WATERLOO NE "Sutup"	123.00		2024.25
3/23/78	Paid by check		2024.25	-0-
4/22/78	(3) WATERLOO NE-DETROIT MI "Dutch Law" "Poulaska" "Sutup" @132.75 ea.	398.25		398.25
5/6/78	Paid by check		398.25	-0-
5/7/78	(1) WATERLOO NE-DETROIT MI Two-yr-old	132.75		132.75
6/12/78	Paid by check		132.75	-0-

UNIFORM LIVE STOCK BILL OF LADING

EXHIBIT "B"

HULL & SMITH HORSE VANS, INC.

ICC – MC 115003
ROUTE 1, BOX 12
ASHLAND, NEBRASKA 68003

No 12393

1230 Tractor No 22 Trailer No ECA Drivers Mc Ilroy Summerland

CEIVED AT Waterloo Nebr DATE 10-7-76

TO the Consignee Tariffs, Rules and Regulations in effect on the date of the issue of this Bill of Lading Hixson Enem

M _____ CITY & STATE _____

DRESS _____

property, described herein in apparent good order, except as otherwise noted, which the Carrier agrees to transport to destination, indicated, if within the scope of its lawful operation. It is mutually agreed as Carrier and as to each party at any time interested in all or any of the property, that every service to be performed hereunder shall be subject to all conditions not prohibited by law, whether printed or written contained, which are hereby agreed to by the Shipper and accepted for himself and his assigns.

Carrier's Basic Rates apply only when the shipment is released to a value not exceeding $200 per animal, whether that in excess of $200 is declared on any animal, there will be added to the basic rate a charge of each $100 or fraction thereof of such excess valuation for each 100 miles or fraction thereof between points of origin and destination, subject to a minimum charge of $50 per animal. The agreed or ed value of the property is hereby specifically stated by the Shipper to be not exceeding $ _____ per animal.

NSIGNED TO LOCH RAVEN

DRESS _____ CITY & STATE Cheswold Md

BILL TO NAME & ADDRESS	NAME NUMBER & KIND OF ANIMALS PARAPHERNALIA PETS MASCOTS ETC	DESCRIB & DECLARED VALUE OF EA ANIMAL	CHARGE FOR EXCESS VALUE	STALL SPACE	BASIC CHARGE
	Ginger Quick	$200 00	N C		20 8 50
	Automatic Son	200 00			20 8 50
	Tisha Bay - (Grey)	200 00			20 8 50
I. Childs	Tisha Tay - (Grey)	200 00			20 8 50
202	Music Man	200 00			20 8 50
Olson Bldg	Canadian Music (Stud)	200 00			20 8 50
City, Mich	Major Lisa	200 00			20 8 50
49706	Major Lisa Wearing City	200 00	N C		20 8 50
		200 00			
		200 00			
		200 00			
		200 00			

23a

		200 00			
		200 00			
		200 00			

e apparent good order	Payment $	CHARGES	166 —
	Received: Date	VET. FEES	—
	By	STALL RENT & FEED	
		ATTENDENT	
and REGISTRATION sent with horses, receiver must acknowledge receipt.		CHARGE FOR EXCESS VALUE	
Received by		TOTAL CHARGE	166 —

CONTRACT TERMS AND CONDITIONS

CTION 1 The Shipper agrees that the Carrier shall not be responsible for the conduct or acts of the animals to themselves or to each other, such as biting, kicking, goring or smothering, nor for loss or ... from the condition of the animals themselves, or which results from their nature or propensities, which risks are assumed by the shipper. The Shipper hereby releases and discharges the Carrier from ... to any injuries to or loss of said animals and participations from any cause whatsoever unless such delay, injuries, or loss shall be caused by the Carrier or by the negligence of its agent or employees, and ... Carrier shall be liable only to the extent of actual damage sustained and in no event to an amount for an animal in excess of the value declared herein.

CTION 2: The Carrier's charges do not include the loading, unloading, handling, feeding, watering and other care of animals. Shipments of livestock may be accompanied by one or more attendants acting as employees or agents of the Shipper and it shall be the duty and responsibility of such attendants to care for, load and unload the animals. The Carrier shall be responsible only for the actual transportation ...

CTION 3: Attendants will be transported free, together with their beds, bedding and baggage, but in consideration of such free transportation the Carrier shall not be responsible, other than as a private ... for any personal injury or death to said attendants or loss of or damage to their belongings. Attendants must ride in the body of the vehicle where they may readily care for the shipment at all times.

CTION 4: The Shipper agrees to indemnify and save harmless the Carrier from all claims, liabilities and demands of every kind by reason of personal injuries or death sustained by such attendants, whether ... the Carrier's negligence or otherwise. This is in consideration of the free transportation of said attendants acting as the agents or employees of the Shipper.

CTION 5: The above Terms and Conditions shall be binding upon the Carrier, the Shipper and the Consignee, and shall apply to any reconsignment or return of the shipment.

ULL & SMITH HORSE VANS, INC.

SIGNED IN TRIPLICATE

Shipper Y B M. Jr. Knox

r Hoot
(AGENT OR DRIVER)

Per

ATTENDANT'S CONTRACT

In consideration of the free transportation of the undersigned upon the same vehicle wherein animals referred to in the foregoing Bill of Lading are transported, which said animals are to be under the full care and ... of the undersigned, said free transportation being at the request of the undersigned, it is hereby agreed by each signatory hereto that said Carrier is and shall be liable only as a common carrier for any personal ... death or loss or damage to the belongings of said signatories. Each of the undersigned hereby agrees to indemnify and save harmless the Carrier from any and all claims, liabilities and demands of any and every ... arising out of any personal injury or death, or loss or damage of any and every kind or nature sustained while in, upon or about the vehicle of the Carrier or incurred while acting as attendant for the aforementioned animals.

EXHIBIT "C"

HULL & SMITH HORSE VANS, INC.

ICC - MC 115nnJ
ROUTE 1 BOX 12
ASHLAND, NEBRASKA 68003

No 13815

Date 6/2 Tractor No 17 Trailer No 118 Drivers NAIL BAKER

RECEIVED AT CHEYENNE City, Wyoming DATE 4-5-79

subject to the Classifications Tariffs Rules and Regulations in effect on the date of the issue of this Shipping

FROM LOC-RANCH Farm

ADDRESS MR SALLANSKI CITY & STATE 301-885-5200

The property described herein in apparent good condition (except as otherwise noted) which the Carrier agrees to transport to destination indicated (which is the place of its lawful operation. It is mutually agreed as to the Carrier and as to each party at any time interested in any or all of the property that every service to be performed hereunder shall be subject to all conditions not prohibited by law, whether printed or written herein contained, which are hereby agreed to by the Shipper and accepted for himself and his assigns.

The Carrier's Basic Rates apply only when the shipment is released to a value not exceeding $200 per animal. When a value in excess of $200 is declared on any animal, there will be added to the basic rate a charge of .04 for each $100 or fraction thereof of such excess valuation for each 100 miles or fraction thereof of hauling (Canadian points of origin and destination, subject to a minimum charge of $50 per animal). The agreed or declared value of the property is hereby specifically stated by the Shipper to be not exceeding $ N/C per animal(s)

CONSIGNED TO MIKE BALLE

ADDRESS 313-655-8950 CITY & STATE TAYLOR Michigan

BILL TO NAME & ADDRESS	NAME, NUMBER & KIND OF ANIMALS, PARAPHERNALIA, PETS, MASCOTS, ETC	DESCRIP. & DECLARED VALUE OF EA. ANIMAL	CHARGE FOR EXCESS VALUE	STALL SPACE	BASIC CHARGE
1 J. J. CARNS	Automatic Spin	X $200.00	N/C	X	372 —
2 AWARE THAT	Foal	200.00			
3 GINGER QUICK IS	Ginger Quick	200.00		1	124 —
4 DUE TO FOAL	Tributum	200.00		1	124 —
5 APRIL 5, 1979	Major Line	200.00		1	124 —
6 HULL + SMITH	Mags Wind	200.00		1	124 —
7 NOT RESPONSIBLE	Canyon Music	200.00		1	124 —
8 FOR CONDITION	Swinging Flight	200.00		1	124 —
9 OF MARE + FOAL	Voice Saved	200.00		1	124 —
10 ENROUTE & CR	Up Up	200.00		1	124 —
11 UPON ARRIVAL	Pc Bird	200.00		1	124 —
12 IN Michigan	Yearling Colt	200.00		1	124 —
13	Yearling Filly	200.00	N/C	1	124 —
14 J. L. Szymanski		200.00			
15		200.00			

Received in apparent good order

Signature of Carrier

Payment $

Received: Date

By

CHARGES	1736 —
VET. FEES	
STALL RENT & FEED	
ATTENDENT	
CHARGE FOR EXCESS VALUE	
TOTAL CHARGE	1736 —

Bill(s) and REGISTRATION sent with horses, receiver must acknowledge receipt.

Received by

CONTRACT TERMS AND CONDITIONS

SECTION 1. The Shipper agrees that the Carrier shall not be responsible for the conduct or acts of the animals to themselves or to each other, such as biting, kicking, goring or smothering, nor for loss or injury arising from the nature of the animals themselves, or which results from their nature or propensities, which risks are assumed by the shipper. The Shipper hereby releases and discharges the Carrier from liability for injuries to or loss of said animals and paraphernalia from any cause whatsoever, unless such injury, injuries, or loss shall be caused by the Carrier or by the negligence of its agent or employees, and in such event the Carrier shall be liable only to the extent of actual damage sustained and in no event to an amount for an animal in excess of the value declared herein.

SECTION 2. The Carrier's charges do not include the loading, unloading, handling, feeding, watering and other care of animals. Shipments of livestock may be accompanied by one or more attendants act as the employees or agents of the Shipper and it shall be the duty and responsibility of such attendants to care for, load and unload the animals. The Carrier shall be responsible only for the actual transportation thereof.

SECTION 3. Attendants will be transported free, together with their feed, bedding and baggage, but in consideration of such free transportation the Carrier shall not be responsible, other than as a private carrier, for any personal injury or death to said attendants or loss of or damage to their belongings. Attendants must ride in the body of the vehicle where they may readily care for the shipment at all times.

SECTION 4. [illegible] from all claims, liabilities and demands of every kind by reason of personal injuries or death sustained by such attendants, whether [illegible] or otherwise, this being the consideration for the free transportation of said attendants acting as the agents or employees of the Shipper.

SECTION 5. The above Terms and Conditions shall be binding upon the Carrier, the Shipper and the Consignee, and shall apply to any reconsignment or return of the shipment.

HULL & SMITH HORSE VANS, INC.

SIGNED IN TRIPLICATE

Per Hull Brown
AGENT OR DRIVER

Shipper J. Szymanski

Per

ATTENDANT'S CONTRACT

In consideration of the free transportation of the undersigned upon the same vehicle wherein animals referred to in the foregoing Bill of Lading are transported, which said animals are to be under the full care and [illegible] of the undersigned, said free transportation being at the request of the undersigned, it is hereby agreed by each signatory hereto that said Carrier is and shall be liable only as a private carrier for any personal [illegible] of damage to the belonging of said signatories. Each of the undersigned hereby agrees to indemnify and save harmless the Carrier from any and all claims, liabilities and demands of any and every [illegible] personal injury or death, or loss or damage of any and every kind of nature sustained [illegible] upon or about the vehicle of the Carrier or its [illegible] while acting as attendant for the animals [illegible] of same.

24a

20

EXHIBIT "D"

UNIFORM LIVE STOCK BILL OF LADING

HULL & SMITH HORSE VANS, INC.

ICC – MC [illegible]
ROUTE 1, BOX 12
ASHLAND NEBRASKA 68003

Nº 13342

Miles 584 Tractor No 12 Trailer No 1211 Drivers No. 2 Baker

RECEIVED AT Kentucky Exhibition Track DATE 4-2-72

subject to the Classifications, Tariffs, Rules and Regulations in effect on the date of the issue of this Bill of Lading

FROM Tobin & Tobin

ADDRESS CITY & STATE Bucks County Pa

The property described below, in apparent good condition (except as otherwise noted), which the Carrier agrees to transport to destination indicated, (which is the route of its usual operation). It is mutually agreed as to the Carrier and as to each party at any time interested in any or all of the property, that every service to be performed hereunder shall be subject to all conditions not prohibited by law, whether printed or written, herein contained, which are hereby agreed to by the Shipper and accepted for [illegible] self and his agents.

The Carrier's Basic Rates apply only when the shipment is released to a value not exceeding $200 per animal. When a valuation in excess of $200 is declared on any animal, there will be added to the basic rate a charge of .05¢ for each $100 or fraction thereof in such excess valuation for each [illegible] over [illegible] as shown thereon, between points of origin and destination, subject to a minimum charge of $50 per animal. The agreed or declared value of the property is hereby specifically stated by the Shipper to be not exceeding $ 200 per animal.

CONSIGNED TO Mark McCormick

ADDRESS Hazel Park CITY & STATE Detroit Mich

BILL TO NAME & ADDRESS	NAME, NUMBER & KIND OF ANIMALS PARAPHERNALIA PETS MASCOTS ETC	DESCRIP & DECLARED VALUE OF EA ANIMAL	CHARGE FOR EXCESS VALUE	STALL SPACE	BASIC CHARGE	
J.J. Caccas	Plausha	$200.00	N.C.	1½	178	89
	Palaupe	200.00		1½	178	89
	Sutup	200.00		1½	178	89
	Chuby Chocks	200.00	N.C.	1½	178	89
	I'm Not Joking	200.00	N.C.	1½	178	89
		200.00				
		200.00				
		200.00				
		200.00				
		200.00				
		200.00				
		200.00				
		200.00				
		200.00				
		200.00				

received in apparent good order Fleming Carroll

Payment $

Received Date

By

CHARGES 894 40

VET FEES

STALL RENT & FEED

ATTENDENT

CHARGE FOR EXCESS VALUE

TOTAL CHARGE 894 40

DOCUMENTS and REGISTRATION sent with horses, receiver must acknowledge receipt.

Received by

CONTRACT TERMS AND CONDITIONS

SECTION 1: The Shipper agrees that the Carrier shall not be responsible for the conduct or acts of the animals to themselves or to each other, such as biting, kicking, goring or smothering, nor for loss or injury resulting from the condition of the animals themselves or of which results from their nature or propensities, which risks are assumed by the shipper. The Shipper hereby releases and discharges the Carrier from liability for delay, shortage, injury, loss of said animals and per animal risk from any cause whatsoever, unless such delay, injuries, or loss shall be caused by the Carrier or by the negligence of its agent or employees, and in such event the Carrier shall be liable only to the extent of actual damage sustained and in no event for an amount for an animal in excess of the value declared herein.

SECTION 2: The Carrier's charges do not include the loading, unloading, handling, feeding, watering and other care of animals. Shipments of livestock may be accompanied by one or more attendants act only as the employees or agents of the Shipper and it shall be the duty and responsibility of such attendants to care for, load and unload the animals. The Carrier shall be responsible only for the actual transportation thereof.

SECTION 3: Attendants will be transported free together with their beds, bedding and baggage, but in consideration of such free transportation the Carrier shall not be responsible, other than as a private carrier, for any personal injury or death to said attendants or loss of or damage to their belongings. Attendants must ride in the body of the vehicle where they may readily care for the shipment at all times.

SECTION 4: The Shipper agrees to indemnify and save harmless the Carrier from all claims, liabilities and demands of every kind by reason of personal injuries or death sustained by such attendants, whether caused by negligence or otherwise. This being in consideration of the free transportation of said attendants, whether the agents or employees of the Shipper.

SECTION 5: The above Terms and Conditions shall be binding upon the Carrier, the Shipper and the Consignee, and shall apply to any reconsignment or return of the shipment.

HULL & SMITH HORSE VANS, INC.

SIGNED IN TRIPLICATE

Shipper X John Tobin Jr

Per Bart (AGENT OR DRIVER)

Per

ATTENDANT'S CONTRACT

In consideration of the free transportation of the undersigned upon the same vehicle wherein animals referred to in the foregoing Bill of Lading are transported, which said animals are to be under the full care and charge of the undersigned, said free transportation being at the request of the undersigned, it is hereby agreed by each signature hereto that said Carrier is and shall be liable only as a private carrier for any personal injury, death or loss or damage to the belongings of said signatories. Each of the undersigned hereby agrees to indemnify and save harmless the Carrier from any and all claims, liabilities and demands of any and every nature arising out of any personal injury or death, or loss or damage of any and every kind or nature sustained while in, upon or about the vehicle of the Carrier or incurred while acting as attendant for the aforementioned animals.

25a

EXHIBIT "E"

17492

ICC — MC 113693 21
ROUTE 1, BOX 12
ASHLAND, NEBRASKA 68003

22'6 Tractor No 19 Trailer No 12H Drivers BAKER Fremere

RECEIVED AT Toledo To CP DATE 1-27-80

Subject to the Classifications, Terms, Rules and Regulations in effect on the date of the issue of this Bill of Lading

FROM

ADDRESS CITY & STATE Toledo OHIO

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which the undersigned agrees to carry to the Carrier and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, which are hereby agreed to by the Shipper and accepted for himself and his assigns.

The Carrier's Basic Rates apply only when the shipment is released to a value not exceeding $200 per animal. When a value in excess of $200 is declared on any animal, there will be added to the basic rate a charge of 20¢ for each $1.00 or fraction thereof of such excess valuation for each 100 miles or fraction thereof by which the distance between points of origin and destination, subject to a minimum charge of $50 per animal. The agreed or declared value of the property is hereby specifically stated by the Shipper to be not exceeding $ (see attached) per animal.

CONSIGNED Ray Priddy

ADDRESS Fonda PARK RACE TRK CITY & STATE Inglewood Calif.

	BILL TO NAME & ADDRESS	NAME, NUMBER & DESCRIPTION OF ANIMALS PARAPHERNALIA PETS MASCOTS ETC.	DESCRIP & EXTRA VALUE CALLED FOR BY ANIMAL	CHARGE FOR EXCESS VALUE	STALL SPACE	BASIC CHARGE
1	Owner:		$200.00			652.88
2	J.J. CARRAS	Mare Saddle Syr. B	200.00	NC	1½	~~652.88~~
3	120 Bay Scott Rd		200.00			652.88
4	Bay City, Mic.	B BEAR 3yr. F	200.00	NC	1½	~~652.88~~
5			200.00			
6			200.00			
7			200.00			
8			200.00			
9			200.00			
10			200.00			
11			200.00			
12			200.00			
13			200.00			
14			200.00			
15			200.00			1305.76

Received in apparent good order

by J. Fred Harper

after

Payment $

Received Date

By

CHARGES	~~1305.76~~
VET FEES	
STALL RENT & FEED May 20 00	
ATTENDENT Albuq.	
CHARGE FOR EXCESS VALUE	156.69
TOTAL CHARGE	1482.45

COLORS and REGISTRATION sent with horses receiver must acknowledge receipt.

date Received by

CONTRACT TERMS AND CONDITIONS

SECTION 1: The Shipper agrees that the Carrier shall not be responsible for the conduct or acts of the animals to themselves or to each other, such as biting, kicking, rubbing or smothering, nor for loss or damage arising from the condition of the animals themselves or which results from their nature or propensities, which risks are assumed by the Shipper. The Shipper hereby releases and discharges the Carrier from all liability for delay, injuries to or loss of said animals and personalities from any cause whatsoever, unless such delay, injuries, or loss shall be caused by the Carrier or by the negligence of its agents or employees, and in such event the Carrier shall be liable only to the extent of actual damage sustained and in no event to an amount for an animal in excess of the value declared hereon.

SECTION 2: The Carrier's charges do not include the loading, unloading, handling, feeding, watering, and other care of animals. Shipments of livestock may be accompanied by one or more attendants at his (or) (or) the employees or agents of the Shipper and it shall be the duty and responsibility of such attendants to care for, load and unload the animals. The Carrier shall be responsible only for the actual transportation thereof.

SECTION 3: Attendants will be transported free together with their beds, bedding and baggage, but in consideration of such free transportation the Carrier shall not be responsible, either (han as a bailee or carrier, for any personal injury or death to said attendants or loss of or damage to their belongings. Attendants must ride in the body of the vehicle where they may readily care for the shipment at all times.

SECTION 4: The Shipper agrees to indemnify and save harmless the Carrier from all claims, liabilities and demands of every kind on account of personal injuries or death sustained by such attendants, whether the same be caused by negligence or otherwise, the same in connection with the free transportation of said attendants acting as the agents or employees of the Shipper.

SECTION 5: The above Terms and Conditions shall be binding upon the Carrier, the Shipper and the Consignee, and shall apply to any reconsignment or return of the shipment.

HULL & SMITH HORSE VANS, INC.

SIGNED IN TRIPLICATE

Shipper

Per (AGENT OR DRIVER)

Per

ATTENDANTS CONTRACT

In consideration of the free transportation of the Undersigned upon the same vehicle on which animals related to in the foregoing Bill of Lading are transported, which said animals are to be under the full care and charge of the Undersigned, said free transportation being at the request of the Undersigned, he hereby agrees to, each separately for himself, that said Carrier is and shall be liable to as a bailee carrier of any personal property, death, or loss or damage to the possessions of said signatories. Each of the Undersigned hereby agrees to indemnify and save harmless the Carrier from any and all claims, demands of any and every nature arising out of any personal injury or death or loss or damage of any and every kind or nature sustained while in, upon or about the vehicle of the Carrier or occurred while acting as attendant for the aforementioned animals.

26a

STATEMENT

HULL and SMITH

HORSE VANS, INC.

PHONE (402) 944-3357
ROUTE 1
ASHLAND, NEBR. 68003
I.C.C.—MC-115663
N.S.R.C.— M-11854

J. J. CANNIS
2003 BOY SCOUT ROAD
BAY CITY MI 48706

Balance Forwarded -0-

DATE	DESCRIPTION	CHARGES	CREDITS	BALANCE
6/27/78	(6) WATERLOO NE-CHESAPEAKE BAY MD	1576.02		1576.02
	"Swinging Flight" "I'm Not Joking"			
	"Chubby Cheeks" "Marywood" "Automatic Spin"			
	"Major Line" @262.67 ea.			
8/5/78	Paid by check		1576.00	-0-
10-7-78	(8) WATERLOO NE-CHESAPEAKE MD	1668.00		1668.00
	"Ginger Quick" "Automatic Spin" "Isha Ban"			
	"Isha Ban" weanling colt; "Marge Wood"			
	"Canyon Music" "Major Line"			
	"Major Line" weanling filly @208.50ea			
4/5/79	(13)CHESAPEAKE CITY MD-FENTON MI	1736.00		3404.00
	"Automatic Spin" & Foal (Box Stall) @372.00			
	"Ginger Quick" "Ishabam" "Major Line"			
	"Marge Wood" "Canyon Music" "Swinging Flight"			
	"Voice Sound" "Up Up" "Po Bear" Yrlg Colt			
	Yrlg Filly @124.00 ea.			
4/7/79	(5) PHILADELPHIA PA-DETROIT MI	894.40		4298.40
	"Plousha" "Paloupe" "Sutup"			
	"Chubby Cheeks" "I'm Not Joking" @178.88 ea.			
				PAY LAST AMOUNT IN THIS COLUMN

THIS STATEMENT WAS PRODUCED ON THE "SECRETARY" COPYING MACHINE AND IS AN EXACT DUPLICATE OF YOUR ACCOUNT WITH US.

HULL and S... HORSE VANS, INC.

PHONE (402) 944-3357
ROUTE 1
ASHLAND, NEBR. 68003
I.C.C.—MC-115663
N.S.R.C.— M-11854

J J CARRAS
2903 BOY SCOUT RD
BAY CITY MI 48706

BALANCE FORWARD 4298.40

DATE	DESCRIPTION	CHARGES	CREDITS	BALANCE
/27/80	(2)DETROIT MI-INGLEWOOD CA	1305.76		5604.16
	"Voice Sound" "Po Bear" @652.88 ea.			
	Fuel Surcharge	156.69		5760.85
	Layover-1 day-Albuquerque NM	20.00		5780.85
	@10.00 a head			

PAY LAST AMOUNT IN THIS COLUMN

THIS STATEMENT WAS PRODUCED ON THE "SECRETARY" COPYING MACHINE AND IS AN EXACT DUPLICATE OF YOUR ACCOUNT WITH US.

APPENDIX E
STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

HULL AND SMITH HORSE VANS, INC.,
a foreign corporation,
Plaintiff,

File No. 80-4283

v.

JAMES J. CARRAS,
Defendant.

FIRST AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO THIRD AMENDED COMPLAINT AND AFFIDAVIT

Defendant by leave of court, files this First amended answer and affirmative defenses, and answering plaintiff's Third Amended Complaint and Affidavit herein says:

GENERAL ALLEGATIONS

1. Admits that plaintiff is a foreign corporation. Denies it was authorized to do business in Michigan during the times in question. Denies it was licensed under MCL 476.1 et seq. or MCL 477.1 et seq. during any of the times in question here.

2. Admitted.

3. Paragraphs a–e inclusive are admitted. Defendant admits that part of Exhibit A with which are in support of the allegations of Plaintiff's paragraphs a–e inclusive. Defendant further states he is without knowledge or information sufficient to form a belief as to the truth of the remaining averments with respect to whether the charges made were legal and therefore

denies the same. Defendant in support of this denial states that the aforegoing transaction set forth by Plaintiff were and are regulated by the Interstate Commerce Act (being 49 USC section 1 at sequence). That Plaintiff is and was an interstate common carrier by motor vehicle of horses other than ordinary generally requiring the authorization of certificates of convenience and necessity issued by the Interstate Commerce Commission and by virtue thereof being subject to the rules and regulations and all tariffs filed with the Interstate Commerce Commission.

ANSWER TO COUNT I

As to the unnumbered paragraph of Plaintiff realleging its General Allegations 1-3 Defendant for answer adopts by reference his answer in his paragraphs 1-3.

4. Admitted.

5. Admitted.

6. Admitted.

7. Denied. Defendant in support of such denial, says that the four broodmares and stallion were in poor condition and undernourished; and that the weanling colt by Ishi Ban was not only in poor condition and undernourished but had a pitchfork wound in its left shoulder with straw embedded.

8. Admitted that Plaintiff made this charge. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of it being a legal charge according to the tariff schedules and rates on file with the Interstate Commerce Commission and therefore denies same. Defendant in further support of his denial states that this charge of October 27, 1978 was and is illegal in that the particular services performed by Plaintiff for which the charges were made were not authorized by Plaintiff common carrier ICC certificate. Defendant

further denies that Exhibit B and F are copies of his account. Defendant in support of this denial says that Exhibits E and F constitute in form bills of lading which are subject to federal law as set forth in 49 USC sections 81-124 conclusive.

9. Denied. In support of this denial Defendant says that it is legally immaterial whether he denies an illegal charge and in addition and in the alternative states that he did object and complain to the Plaintiff of the poor condition the horses arrived in Maryland and to the pitchfork wound in the left shoulder of the weanling colt by Ishi Ban.

AFFIRMATIVE DEFENSE AS TO COUNT I

For a further and affirmative defense to Count I of Plaintiff's Complaint Defendant alleges that the charges of June 27, 1978 and October 27, 1978 are illegal in that the particular services performed were not authorized by Plaintiff's common carrier ICC certificate in accordance with 49 USC sections 317(b) and 49 USC sections 10761, 10921, 10922, 10923, 10924, 10925, 10930 and 49 CFR sections 1307.21, 1307.22(a) and (b); 1307.27(d), 1307.29, 1307.202(c), 1307.202(f), and 1322.3.

WHEREFORE Defendant prays that judgment be rendered in his favor, with costs and Defendant demands in accordance with GCR 1963, 110.1 a reply to his answer.

ANSWER TO COUNT II

As to the unnumbered paragraph of Plaintiff realleging its General Allegations 1-3 Defendant for answer adopts by reference his answer in his paragraphs 1-3.

10. Admitted except as to the allegation of a fee which Defendant denies. Defendant in support of such denial states

that the Plaintiff is and was a common carrier and subject to the laws, rules and regulations of the Federal Interstate Commerce Commission, 49 USC section 1 et seq. and 49 CFR section 1300 et seq. and 49 CFR 1307 et seq.

That the fee charges are legally authorized and determined by the Interstate Commerce Commission. That Defendant is without knowledge or information sufficient to form a belief as to the truth that the fee charged is the legal rate according to the tariff schedules and rates on file with Interstate Commerce Commission and therefore denies same. Defendant in the alternative states that the fee for this transportation performed was not authorized by Plaintiff common carrier's ICC certificate on the date in question and is therefore illegal.

11. Admitted.

12. Admitted except for Ishi Ban.

13. Admitted that Plaintiff made this charge. Denied that Defendant owes any such sum. Defendant upon arrival of said horses offered to pay Plaintiff not being aware that said charge was illegally being made for the reason that such transportation service was not authorized by Plaintiff's common carrier certificate. Defendant further denies having been sent Exhibit "C" nat any time prior to the institution of the law suit. Defendant further states that Plaintiff has represented to Defendant on two occasions that the bills of lading merely represented receipts. Defendant further states that Exhibit "C" is not an account but a bill of lading subject to 49 USC sections 80-124.

14. No answer is required. Said allegation is legally immaterial and irrelevant. Defendant is not required under the law to object to an illegal charge.

AFFIRMATIVE DEFENSE AS TO COUNT II

For a further and affirmative defense to Count II, Defendant alleges that the charge of April 5, 1979 is illegal in that the particular service performed was not authorized by Plaintiff's common carrier ICC certificate in accordance with 49 USC sections 317(b) and 49 USC sections 10761, 10921, 10923, 10924, 10925, 10930 and 49 CFR sections 1307.21, 1307.22(a) and (b); 1307.27(d), 1307.29, 1307.202(c), 1307.202(f), and 1322.3.

WHEREFORE Defendant prays that judgment be rendered in his favor, with costs and Defendant demands in accordance with GCR 1963, 101.1 a reply to his answer.

ANSWER TO COUNT III

As to the unnumbered paragraph of Plaintiff realleging its General Allegations 1-3 Defendant for answer adopts by reference his answer in his paragraphs 1-3.

15. Denied. Defendant in support of this denial states that he requested six horses to be transported by Plaintiff and that Plaintiff agreed to transport the registration certificates, tack and colors of Defendant which Plaintiff deliberately failed to do. That Defendant was not aware that Plaintiff was not authorized by their ICC certificate to transport race horses from Pennsylvania and that the transport by Plaintiff was illegal. In the alternative, Defendant is without knowledge or information sufficient to form a belief as to the truth that the charge of $894.00 by Plaintiff is proper. And therefore denies the same.

16. Admitted that five of Defendants horses were transported as indicated. Denied that it was pursuant to this request. Defendant repeats and realleges his answer to paragraph 15 of Plaintiff's Count II.

17. Admitted.

18. Defendant admits that Plaintiff has claimed such a charge. Defendant denies that he owes such a charge. Defendant is without knowledge or information to form a belief as to whether such a charge is legal under the tariff schedules and rates on file and therefore denies the same. Defendant again alleges that the charge is and was illegal because the service performed was not authorized by Plaintiff's ICC certificate. Defendant further denies being sent Exhibit "D". That "D" is a bill of lading subject to 49 USC sections 80-124.

19. Denied. In support of this denial Defendant states this is untrue, in addition and in the alternative Defendant states that all conditions precedent to payment if said charge were legal had not occurred or been performed. That further the services were never completed as promised and that these uncompleted services were substantial.

AFFIRMATIVE DEFENSE AS TO COUNT III

For a further and affirmative defense to Count III, Defendant alleges that the charge of April 7, 1979 is illegal in that the particular service performed was not authorized by Plaintiff's common carrier ICC certificate in accordance with 49 USC sections 317(b) and 49 USC sections 10761, 10921, 10923, 10924, 10925, 10930 and 49 CFR sections 1307.21, 1307.22(a) and (b); 1307.27(d), 1307.29, 1307.202(c), 1307.202(f), and 1322.3.

WHEREFORE Defendant prays that judgment be rendered in his favor, with costs and Defendant demands in accordance with GCR 1963, 110.1 a reply to his answer.

ANSWER TO COUNT IV

As to the unnumbered paragraph of Plaintiff realleging its General Allegations 1-3 Defendant for answer adopts by reference his answer in his paragraphs 1-3.

20. Denied. In support of this denial Defendant states that Ray Priddy contacted a Black Horse Vans, Inc. from New York to transport these two horses and a horse owned by Defendant's brother, Peter J. Carras.

21. Denied that it was done pursuant to his request. In support of this denial Defendant repeats and realleges defendant's paragraph 20 in answer to Plaintiff's of paragraph 20 of its complaint. As to the remaining allegations of this paragraph 21 of Plaintiff's Complaint Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments and therefore denies same.

22. As to the averments in Plaintiff's paragraph 22 of its Complaint Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments and therefore denies same.

23. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Plaintiff's paragraph 23 of its complaint and therefore denies the same except that the allegation by Plaintiff that Defendant, James J. Carras was notified of the charge for transport is denied on the basis of his own knowledge.

24. As to the allegations of Plaintiff's paragraph 24 of its Complaint it is denied that Plaintiff claimed that this was the total charge for this service. In support of this denial Defendant states that Plaintiff claimed the total charge for this service was $5,780.85. Defendant denies being requested to pay the sum of $1,482.45 and denies being sent a copy of this account. Defendant further denies owing any thing. Defendant states

that this charge is illegal even if performed in that it was not authorized by Plaintiff's certificate. Defendant states that Exhibit "F" is a bill of lading and subject to 49 USC sections 80-124. Defendant further states that even if there were a contract with Plaintiff all conditions precedent to payment had not been made because there has been no delivery to the consignee.

AFFIRMATIVE DEFENSE AS TO COUNT IV

For a further and affirmative defense to Count IV, Defendant alleges that the charge of January 27, 1980 is illegal in that the particular service performed was not authorized by Plaintiff's common carrier ICC certificate in accordance with 49 USC sections 317(b) and 49 USC sections 10761, 10921, 10923, 10924, 10925, 10930 and 49 CFR sections 1307.21, 1307.22(a) and (b); 1307.27(d), 1307.29, 1307.202(c), 1307.202(f), and 1322.3.

WHEREFORE Defendant prays that judgment be rendered in his favor, with costs and Defendant demands in accordance with GCR 1963, 110.1 a reply to his answer.

ANSWER TO COUNT V

As to the unnumbered paragraph of Plaintiff realleging its General Allegations 1-3 Defendant for answer adopts by reference his answer in his paragraphs 1-3.

25. Plaintiff has omitted the numerical number of 25.

26. Denied. In support of this denial Defendant states if these horses were transported to California it was not pursuant to his request or his agent. As to the allegation that Plaintiff transported two of his horses from Toledo, Ohio to Inglewood, California Defendant is without knowledge or information sufficient to form a belief as to the truth of these

averments in paragraph 26 of Plaintiff's complaint and therefore denies the same. Defendant further states that the transportation of horses other than ordinary by Plaintiff from Ohio to California is not authorized by Plaintiff's ICC certificate and is therefore illegal.

27. Denied. Defendant in support of this denial states that Plaintiff claimed the total charge for this service was $5,780.85. That even if there were a legitimate contract to transport these two horses Plaintiff has failed to make delivery to the consignee and has forfeited any statutory lien, Defendant further denies any request for this amount until a lawsuit was filed in 74th Judicial District for Bay County, Michigan.

28. Plaintiff's allegations in paragraph 28 of its Complaint herein are legally immaterial. Defendant states that Plaintiff was not authorized to transport these horses by Defendant or any agent; that said transportation was illegal not being authorized by Plaintiff's ICC certificate; that Plaintiff has failed or refused to make delivery to the consignee; that Plaintiff was tendered the sum of $1,482.45 by the consignee; Ray Priddy and Plaintiff refused to accept same; and that Defendant states that the charge even if any charge is legal is regulated or governed by the tariff schedules and rates on file with the ICC and Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments that this is a proper amount of charge for this transportation and therefore denies the same.

29. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the averments in Plaintiff's paragraph 29 of its Complaint and therefore denies the same.

30. Denied. Defendant in support of this denial denies that such an offer has ever bona fidely been made. That further Plaintiff is not entitled to any sum since delivery of race horses was not made to the consignee, Ray Priddy.

AFFIRMATIVE DEFENSE AS TO COUNT V

I. For a further and affirmative defense to Count V, Defendant alleges that the charge of January 27, 1980 is illegal in that the particular service performed was not authorized by Plaintiff's common carrier ICC certificate in accordance with 49 USC sections 317(b) and 49 USC sections 10761, 10921, 10923, 10924, 10925, 10930 and 49 CFR sections 1307.21, 1307.22(a) and (b); 1307.27(d), 1307.29, 1307.202(c), 1307.202(f), and 1322.3

II. For a further affirmative defense Defendant states that Exhibit "F", the bill of lading, is a straight bill of lading and Plaintiff has no lien under 49 USC section 82; 49 USC section 105; and 49 USC section 10744(a)(1).

III. That as a further affirmative defense in the alternative Defendant alleges that the Plaintiff made overcharges by utilizing a box and half stall; charged excess value with out the consent of Defendant, and on information and belief utilized a route other than the cheapest available route.

WHEREFORE Defendant prays that judgment be rendered in his favor, with costs and Defendant demands in accordance with CCR 1963, 110.1 a reply to his answer.

/s/ JAMES J. CARRAS

JAMES J. CARRAS
Defendant
2903 Boy Scout Road
Bay City, MI 48706

I declare that the statements above are true to the best of my information, knowledge and belief.

/s/ JAMES J. CARRAS

JAMES J. CARRAS
Defendant
2903 Boy Scout Road
Dated: March 11, 1982 Bay City, MI 48706
Tele: 515-686-0341

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF BAY

HULL AND SMITH HORSE VANS, INC.,
a foreign Corporation,
Plaintiff,

v. File No. 80-4283

JAMES J. CARRAS,
Defendant.

REQUEST FOR ADMISSION
OF FACTS AND GENUINENESS OF DOCUMENTS

Defendant request Plaintiff within 10 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

A. Certificate of Public Convenience and Necessity served August 20, 1969, in Docket No. MC-115663, (Sub.No.2)

B. Certificate of Public Convenience and Necessity served August 4, 1970, in Docket No. MC-115663, (Sub.No.3)

C. Certificate of Public Convenience and Necessity served on August 25, 1972, in Docket No. MC-115663, (Sub.No.4)

D. Certificate of Public Convenience and Necessity served November 30, 1977, in Docket No. MC-115663, (Sub.No.5)

E. Certificate of Public Convenience and Necessity served January 23, 1979, in Docket No. MC-115663, (Sub.No.6F)

F. Certificate of Public Convenience and Necessity served July 23, 1980, in Docket No. MC-115663, (Sub.No.7F)

G. Certificate of Public Convenience and Necessity served June 8, 1981, in Docket No. MC-1156[illegible]3, (Sub.No.8)

2. That each of the following statements is true.

A. That Plaintiff was not authorized by any Certificate of Public Convenience and Necessity, to engage in the transportation of Race Horses or Horses other than Ordinary in interstate commerce between points in Nebraska and points in Maryland on or about October 27, 1978.

B. That Plaintiff was not authorized by any Certificate of Public Convenience and Necessity, to engage in the transportation of Race Horses or Horses other than Ordinary in interstate commerce between points in Michigan and points in Maryland on or about April 5, 1979.

C. That Plaintiff was not authorized by any Certificate of Public Convenience and Necessity, to engage in the transportation of Race Horses or Horses other than Ordinary in interstate commerce between points in Pennsylvania and points in Michigan on or about April 7, 1979.

D. That Plaintiff was not authorized by any Certificate of Public Convenience and Necessity, to engage in the transportation of Race Horses or Horses other than Ordinary in

interstate commerce between points in Ohio and points in California on or about January 27, 1980.

E. That Plaintiff was not authorized by any Certificate of Public Convenience and Necessity, to engage in the transportation of Race Horses or Horses other than Ordinary in interstate commerce between points in Michigan and points in California on or about January 27, 1980.

3. That Plaintiff had never mailed, sent or delivered a copy of Exhibit "E" being bill of lading #17492 until their institution of suit in Bay County, Michigan.

4. That Fred Hays whose name appears on Exhibit "E" is an employee or agent of the Plaintiff.

/s/ JAMES J. CARRAS

JAMES J. CARRAS, *Defendant*
2903 Boy Scout Road
Bay City, MI 48706
(517) 686-0341

Dated: June 5, 1982

APPENDIX G

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF BAY

HULL AND SMITH HORSE VANS, INC.,
a Foreign Corporation,
Plaintiff,

vs. File No. 80-4283

JAMES J. CARRAS,
Defendant.

RESPONSE TO REQUEST FOR ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

GENE HULL, President of HULL AND SMITH HORSE VANS, INC., being duly sworn says that he is an officer for the Plaintiff in the above-entitled action, and makes this Affidavit in response to a Request for Admissions served on him by the Defendant on June 8, 1982.

1. A. Plaintiff admits this document is genuine.

B. Plaintiff admits this document is genuine.

C. Plaintiff admits this document is genuine.

D. Plaintiff admits this document is genuine.

E. Plaintiff admits this document is genuine.

F. Plaintiff admits this document is genuine.

G. Plaintiff admits this document is genuine.

2. A. Plaintiff admits is was not authorized by the terms of the Certificate of Public Convenience and Necessity issued to

it to engage in the transport of Race Horses or Horses other than ordinary in interstate commerce between points in Nebraska and points in Maryland on or about October 27, 1978, but denies any implication that it was not otherwise authorized to make said transport.

B. Plaintiff admits it was not authorized by the terms of the Certificate of Public Convenience and Necessity issued to it to engage in the transport of Race Horses or Horses other than ordinary in interstate commerce between points in Michigan and points in Maryland on or about April 5, 1979, but denies any implication that it was not otherwise authorized to make said transport.

C. Plaintiff admits it was not authorized by the terms of the Certificate of Public Convenience and Necessity issued to it to engage in the transport of Race Horses or Horses other than ordinary in interstate commerce between points in Pennsylvania and points in Michigan on or about April 7, 1979, but denies any implication that it was not otherwise authorized to make said transport.

D. Plaintiff admits it was not authorized by the terms of the Certificate of Public Convenience and Necessity issued to it to engage in the transport of Race Horses or Horses other than ordinary in interstate commerce between points in Ohio and points in California on or about January 27, 1980, but denies any implication that it was not otherwise authorized to make said transport.

E. In response to Request E, Plaintiff denies same, saying that Plaintiff was specifically authorized by the Certificate of Public Convenience and Necessity, I.C.C. No. MC-115663 Subdivision 5 to haul Race Horses or Horses other than ordinary between points in Michigan and points in California on or about January 27, 1980.

3. In response to Requst No. 3, Defendant admits Bill of Lading No. 17492 was not sent to Defendant prior to institution of suit in Bay County Michigan.

4. In response to Request No. 4, Plaintiff denies that Fred Hays is an employee or agent of the Plaintiff, but instead states that he is an independent contractor.

/s/ GENE HULL

GENE HULL, President
HULL AND SMITH HORSE
VANS, INC.
Route #1, Box 12
Ashland, NE 68003

Subscribed and sworn before me this 16th day of June, 1982.

/s/ PATRICIA A. ADAMS

Notary Public
Saunders County, State of Nebraska
My Commission Expires:

APPENDIX H

STATE OF MICHIGAN
IN THE EIGHTEENTH CIRCUIT COURT
FOR THE COUNTY OF BAY

HULL AND SMITH HORSE VANS, INC.,
Plaintiff,

vs File 80-4283

J. J. CARRAS,
Defendant.

MOTION TO STRIKE AFFIRMATIVE DEFENSES

BEFORE THE HONORABLE EUGENE C. PENZIEN, JUDGE

Bay City, Michigan — Monday, October 25, 1982

APPEARANCES:

MR. DAVID OEMING, Attorney at Law
On behalf of the Plaintiff

MR. JAMES J. CARRAS, Attorney at Law
Defendant In Proper Person

Brenda K. Averill, CER-0014

[24]. . .

THE COURT: Well, all right. That's — that's a New York opinion and it's not binding on me and I would use it only insofar as it's persuasive anyway.

The case that seems to be most on point is *ETS-Hokin* [25] v *Maas Transport*, 380 F2d 258. And I have reviewed all of the cases cited in Mr. Carras' original brief. I can't say that I did

look at all the ones in the supplemental brief because I couldn't tell what they were cited for. They were just cited and then no discussion of them. But all the cases that were cited in the original brief I have reviewed and they don't seem to be like *ETS*.

In *ETS* the parties had a contract, a written contract — or an oral contract. Strike that. An oral contract for compensation at a certain rate. The defendant defended on the ground that the contract was illegal because in fact, the plaintiff — I may have the parties mixed up here, but anyway, the — in essence, it was a defense that the plaintiff had engaged in interstate com — transportation although I guess technically none of the plaintiff's vehicles moved out of state, but it was part of a interstate transport of the goods and since the — since the shipper didn't have the appropriate authority from the ICC, the contract which provided for a rate was unenforceable.

The Eighth Circuit Court of Appeals said no, it is enforceable. They found no evidence in the Statute indicating an intention that the contract should be considered void or illegal. The ship — St. Louis Railroad case, 505 F2d 625 from the Fifth Circuit dealt with a situation where the shipper was trying to recover extra charges for diverting a [26] shipment to the consignee's plant and the Court of Appeals in that case said that it was the written contract, bill of lading which set forth the agreement of the parties and the parties could not vary that contract — or the shipper couldn't vary that contract by relying on the tariff, an ICC tariff when the shipper had no authority from the ICC. So, all — what they said in that case was you're stuck with your written contract if you — unless you're operating under a tariff and you're operating under authority from the ICC. If you do have authority from the ICC and you're operating under their tariffs, then the written contract can be waved bye-bye and the carrier can receive more than he said he would ship for. He can recover so-called undercharges. In other words, he said I'll ship it for X and tariff says Y and Y

is more than X, he can recover Y so long as he has authority. If he does not have authority, he can't, which is quite a different situation than the one we have here.

And this — in the case here, we have a claim as a defense that plaintiff is not entitled to recover anything because of the violation of the Interstate Commerce Commission regulations in the Federal Statute. *ETS case, ETS* not to be confused with E.T., that case seems to me to be the case on point. The Court there analyzed the statute and concluded that the writ — the contract of the parties would govern when — when there was a violation and that remedies for the [27] violation would have to take place elsewhere besides in the action between the parties for recovery of the shipping charges. I'm surprised that there aren't more Federal cases on point. The Michigan *Falmouth* case, as I indicated before, is a different situation. There, the Supreme Court said, well the con — the Statute requires, or the regulations require a written contract. We will not allow you to sue for a tort or breach of a oral contract which the require — when the requirement is that it be in writing. But they were there talking about — the breach there was the failure to ship. They weren't talking about a situation where a product had been shipped and the — and the shipper was trying to recover for his shipping charges. And in any event, Michigan would follow Federal law on it. That, the Michigan court of — Supreme Court made clear in *Falmouth* and I don't know that they had any choice anyway.

So, in my opinion, the best Federal law on the subject matter is *ETS*. I am obligated to follow *ETS* also. So, that being the case, and it is my opinion that the matters set forth in the affirmative defenses do not state a defense to plaintiff's contract and plaintiff may have summary judgment, in effect, striking those defenses.

MR. CARRAS: Your Honor?

THE COURT: Yes.

MR. CARRAS: May I address the Court?

APPENDIX I

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF BAY

HULL AND SMITH HORSE VANS, INC.,
Plaintiff

vs. File No. 80-4283

JAMES J. CARRAS,
Defendant

ORDER FOR PARTIAL SUMMARY JUGMENT

AT A SESSION OF SAID COURT HELD ON THE DAY OF , 1982.

PRESENT: HONORABLE EUGENE PENZIEN, CIRCUIT JUDGE

This matter having come on to be heard upon the Motion of Plaintiff, HULL AND SMITH HORSE VANS INC., and the Court having considered the briefs and oral arguments of the parties hereto, and being otherwise fully advised in the premises;

The Court hereby finds that the Motion to Strike Affirmative Defenses is actually a Motion for Partial Summary Judgment pursuant to GCR 117.2, and therefore treats this motion as such;

IT IS HEREBY ORDERED that the affirmative defenses pleaded by Defendant CARRAS in his Amended Answer to the Third Amended Complaint regarding the legality of the services performed shall be stricken as not pleading a valid

defense to the Third Amended Complaint, and that Summary Judgment shall be entered in favor of Plaintiff, HULL AND SMITH HORSE VANS, Inc., regarding said affirmative defenses.

_____

HONORABLE EUGENE C. PENZIEN,
CIRCUIT JUDGE

Countersigned:

_____

Date of Entry November 30, 1982

APPENDIX J

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF SAGINAW

HULL AND SMITH HORSE VANS, INC.,
a foreign corporation,
Plaintiff,

vs. Case No. 80 04283

JAMES J. CARRAS,
Defendant.

ORDER GRANTING SUMMARY JUDGMENT

AT A SESSION OF SAID COURT HELD IN THE COURTHOUSE IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN, ON THE 28 DAY OF FEBRUARY, 1984.

PRESENT: HONORABLE JOSEPH R. McDONALD, CIRCUIT JUDGE

This matter having been presented to the Court upon Plaintiff's Motion For Summary Judgment pursuant to GCR 117.2 (3), and the Court having reviewed and carefully considered the Motion, Answer thereto, and respective Briefs of Counsel and the Court having further heard Argument from Counsel in open Court, and being otherwise fully advised in the premises;

And further, the Court having rendered its opinion in this matter on February 6, 1984;

Now, therefore, IT IS HEREBY ORDERED that Summary Judgment is granted in favor of Plaintiff HULL AND

SMITH HORSE VANS, INC., on Counts 1, 3, and 4 of the Complaint, with the question of damages on each count being reserved for the jury at the time of trial thereon.

/s/ JOSEPH R. McDONALD

JOSEPH R. McDONALD,
CIRCUIT JUDGE

Countersigned:

/s/ JACOLIN MATSON

JACOLIN MATSON

Prepared By:
DAVID F. OEMING, JR. (P23735)
Attorney at Law
2510 State Street
Saginaw, Michigan 48602
Phone: (517) 799-2660

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

HULL AND SMITH HORSE VANS, INC.,
a foreign corporation,
Plaintiff,

vs. Case No. 80-04283

JAMES J. CARRAS,
Defendant.

ORDER GRANTING SUMMARY JUDGMENT

AT A SESSION OF SAID COURT HELD IN THE COURTHOUSE IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN, ON THE 28 DAY OF FEBRUARY, 1984.

PRESENT: HONORABLE JOSEPH R. McDONALD; CIRCUIT JUDGE

This matter having been presented to the Court upon Plaintiff's Motion for Summary Judgment pursuant to GCR 117.2 (3), and the Court having reviewed and carefully considered the Motion and attached Brief of Counsel, and the Court having further heard Argument from Counsel in open Court, and being otherwise fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that Summary Judgment is granted in favor of Plaintiff HULL AND SMITH HORSE VANS, INC., on Count V of the

Complaint, with the question of damages on said Count V being reserved for the jury at the time of trial thereon.

/s/ JOSEPH R. McDONALD

JOSEPH R. McDONALD,
CIRCUIT JUDGE

Countersigned:

/s/ JACOLIN MATSON

JACOLIN MATSON

Prepared By:
DAVID F. OEMING, JR. (P23735)
Attorney at Law
2510 State Street
Saginaw, Michigan 48602
Phone: (517) 799-2660

APPENDIX K

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

HULL AND SMITH HORSE VANS, INC.,
a foreign corporation,
Plaintiff,

vs. Case No. 80-04283

JAMES J. CARRAS,
Defendant.

DAVID F. OEMING, JR. (P23735)
Attorney for Plaintiff

JAMES J. CARRAS,
Attorney for Defendant

JUDGMENT

AT A SESSION OF SAID COURT HELD IN THE COURTHOUSE IN THE CITY AND COUNTY OF SAGINAW AND STATE OF MICHIGAN, ON THE 28 DAY OF FEBRUARY, 1984.

PRESENT: HONORABLE JOSEPH R. McDONALD, CIRCUIT JUDGE

The Jury, by whom the issues joined in this cause were tried, having heretofore and on or about February 21, 1984, rendered a verdict in favor on the Plaintiff and against the Defendant, and having assessed damages against said Defendant, JAMES J. CARRAS, in the following amounts:

Count I, One Thousand Six Hundred and Sixty-eight ($1,668.00) Dollars;

Count II, One Thousand Seven Hundred Thirty-six ($1,736.00) Dollars;

County III, Eight Hundred Ninety-four ($894.40) Dollars and 40/100

Count IV, One Thousand Four Hundred Eight-two ($1,482.45) Dollars and 45/100;

Count V, Fifteen Thousand Seventeen ($15,017.00) Dollars

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that Plaintiff, HULL AND SMITH HORSE VANS, INC., take against the Defendant, JAMES J. CARRAS, its damages as aforesaid in the aggregate amount of Twenty Thousand Seven Hundred Ninety-Seven ($20,797.85) Dollars and 85/100, plus interest from the date of the filing of the Complaint herein, and plus costs to be taxed.

/s/ JOSEPH R. McDONALD

JOSEPH R. McDONALD,
CIRCUIT JUDGE

Prepared By:
DAVID F. OEMING, JR. (P23735)
Attorney at Law
2510 State Street
Saginaw, Michigan 48602
Phone: (517) 799-2660

APPENDIX L

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

HULL AND SMITH HORSE VANS, INC.,
a foreign corporation,
Plaintiff,

vs. File No. 80-04283

JAMES J. CARRAS,
Defendant.

ORDER FOR REASONABLE ATTORNEY FEES AND EXPENSES OF PROOF

AT A SESSION OF SAID COURT HELD IN THE COURTHOUSE IN THE CITY OF SAGINAW, COUNTY OF SAGINAW, STATE OF MICHIGAN, ON THE _____ DAY OF _____, 1984.

PRESENT: HONORABLE JOSEPH R. McDONALD, CIRCUIT JUDGE

The matter having been presented to the Court upon the Motion of Plaintiff for payment of reasonable attorney fees under GCR 316, and for approval of expert witness fees, both to be added to Plaintiff's Taxed Bill of Costs filed herewith, and the Court having considered said Motion with attached affidavits, and being otherwise fully advised in the premises:

THE COURT HEREBY FINDS that although Defendant JAMES J. CARRAS was served with the Petition filed herein with Notice of Hearing five (5) days prior to this hearing date, said JAMES J. CARRAS has failed to appear in response to said Motion

THE COURT FURTHER FINDS that Plaintiff's attorney, DAVID F. OEMING, JR., expended a total of 126.00 hours for services necessitated by the rejection of the Mediation Panel's evaluation in this matter by JAMES J. CARRAS, at a rate of Sixty ($60.00) dollars per hour, which has been paid by Plaintiff to said attorney;

THE COURT FURTHER FINDS that Plaintiff's attorney, ROBERT D. KINSKY, JR., expended a total of 35.6 hours for services necessitated by the rejection of the mediation panel's evaluation, at the reasonable rate of Seventy-five ($75.00) dollars per hour, and 75.7 hours at the reasonable rate of Eighty-five ($85.00) dollars per hour, which amount was paid by Plaintiff to said attorney;

Therefore, IT IS HEREBY ORDERED that the actual costs taxable to Defendant JAMES J. CARRAS pursuant to GCR 316.7 are Sixteen Thousand Six Hundred Sixty-four ($16,664.50) dollars 50/100;

IT IS FURTHER ORDERED that Plaintiff's Motion for payment of reasonable attorney fees incurred prior to the mediation date of January 17, 1983 is denied, and

IT IS FURTHER ORDERED that Plaintiff's Petition for approval of expert witness fee is denied.

JOSEPH R. McDONALD
CIRCUIT JUDGE

Date of Entry
July 6, 1984
Countersigned:

Prepared By:
DAVID F. OEMING, JR. (P23735)
Attorney at Law
2510 State Street
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Phone: (517) 799-2660

APPENDIX M

STATEMENT OF QUESTIONS INVOLVED

I.

ARE ALL THE ORDERS OF DISCRETION BY JUDGE EUGENE C. PENZIEN VOID?

Plaintiff-Appellee answers "No".

Defendant-Appellant answers "Yes".

Judge Joseph R. McDonald refused to decide this issue.

II.

DID PLAINTIFF-APPELLEE HAVE A LEGAL RIGHT TO COLLECT ILLEGAL CHARGES UNDER A QUANTUM MERUIT WHEN THE TRANSACTIONS WERE IN INTERSTATE COMMERCE AND GOVERNED BY FEDERAL LAW?

Plaintiff-Appellee answers "Yes".

Defendant-Appellant answers "No".

Judge Eugene C. Penzien answered "Yes".

Judge Joseph R. McDonald answered "Yes" by implication.

III.

DID PLAINTIFF-APPELLEE ENGAGE IN AN ABUSE OF JUDICIAL PROCESS SO AS TO WARRANT THE SANCTIONS OF A DISMISSAL?

Plaintiff-Appellee would answer "No".

Defendant-Appellant answers "Yes".

IV.

WAS JUDGE JOSEPH R. McDONALD'S CONDUCT OF SUCH A NATURE DURING THE TRIAL OF FEBRUARY 15-17, 1984 THAT DEFENDANT-APPELLANT WAS PREVENTED FROM FULLY PRESENTING HIS CASE?

Plaintiff-Appellee answers "No".

Defendant-Appellee answers "Yes".

V.

SHOULD THE ORDER OF COSTS AND ATTORNEY FEES ON BEHALF OF THE PLAINTIFF-APPELLEE BEEN ENTERED?

Plaintiff-Appellee would answer "Yes".

Defendant-Appellant answers "No".

85-2018

Supreme Court, U.S.
FILED
SEP 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

James J. Carras
Petitioner

vs.

Hull and Smith Horse Vans, Inc.,
Respondent

ON WRIT OF CERTIORARI TO THE
MICHIGAN COURT OF APPEALS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND MOTION TO DISMISS PETITION

DAVID F. OEMING, JR.
(P23735)
Attorney for Respondent
2510 State Street
Saginaw, Michigan 48602
(517) 799-2660

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2). STATUTES and COURT RULES

49 USCA section 10101	5
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49 USCA section 11705	6
Michigan Court Rule 7.313	2

QUESTIONS PRESENTED

(1) Is the decision of the Michigan Supreme Court of March 18, 1986 a final decision within the meaning of Rule 17, Supreme Court Rules?

(2) May a private citizen assert Plaintiff's violation of Interstate Commerce Code section 10921 as a defense to a state court collection action sounding in contract?

(3) Was the Michigan Court of Appeals decision that Respondent Hull & Smith Horse Vans, Inc. was not barred from collecting their charge for hauling Petitioner Carras' horses for him in conflict with the decision of a Federal Court of Appeals?

Respondent Hull and Smith Horse Vans, Inc. states these questions must be answered "NO".

ARGUMENT AND AUTHORITIES

(1) IS THE DECISION OF THE MICHIGAN SUPREME COURT OF MARCH 18, 1986, A FINAL DECISION WITH THE MEANING OF RULE 17, SUPREME COURT RULES?

Petitioner Carras has styled his current Petition as an application for writ of certiorari to the Michigan Court of Appeals, 144 Mich App 712. That case was appealed to the Michigan Supreme Court, which denied leave to appeal (Appendix B, Petition). No request for rehearing was filed by Petitioner Carras in the Michigan Supreme Court, although such a motion is specifically allowed by MCR 7.313(E) (attached hereto as Exhibit 1). As such, the decision of the Michigan Court of Appeals is not a "final judgment or decree

of the highest court of a State" within the meaning of 28 U.S.C.A. Section 1257, and thus Petitioner Carras' petition is improvidently filed.

(2) MAY A PRIVATE CITIZEN ASSERT VIOLATION OF INTERSTATE COMMERCE CODE SECTION 10921, AS A DEFENSE TO A STATE COURT COLLECTION ACTION SOUNDING IN CONTRACT?

Throughout this proceeding, from the Bay County District Court through the Michigan Supreme Court (and in at least three federal trial and appellate courts), Defendant-Appellant Carras has maintained that he should not be held responsible for paying Plaintiff-Appellee Hull and Smith their charges for hauling his race horses, because Hull and Smith did not have a certificate of public convenience and necessity covering the motor carrier routes used to transport Carras' horses. Defendant-Appellant has described these charges as "illegal", and cites several ICC rate

cases to support his claim that because Hull and Smith did not have the proper ICC certificate, Defendant-Appellant Carras need not pay the bill for hauling his horses.

The "federal law" Defendant-Appellant Carras refers to at several places in his Brief is the Interstate Commerce Act, 49 USC 10101 et seq. (hereafter the Act). This federal law establishes the Interstate Commerce Commission (hereafter Commission) and its jurisdiction over interstate carriers, including motor common carriers such as Hull and Smith. The authority and enforcement powers of both the Commission and private persons is set forth in chapter 117 of the Act; in genral, all enforcement power is vested in the Commission, which may act on its own initiative or on

complaint. Private persons have only those rights and remedies set forth in Section 11705 of the Act; all other enforcement power is reserved by the Commission. In this section, subsections(a)-(b) (3) state that a person injured "may file a complaint with the Commission, and then file a civil action to enforce the Commission order if not obeyed". In addition, subsections (c)(1-2) relate only to subchapters I or III of Chapter 105 of the Act; that is, only to rail and water carrier transportation. Thus, it is clear a person injured by a carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission is limited to filing his complaint with the Commission; he may not, by the statute, seek original affirmative relief in the courts. Plaintiff Hull and Smith respectfully suggests that if

Defendant Carras feels Plaintiff has violated some section of the Interstate Commerce Act in hauling his horses at his request, he may take his complaint to the Commission, but he has no statutory right to assert this claim in a state civil action as a defense to Plaintiff's claim for hauling fees.

The prevailing scheme of the Act is to foster orderly competition among interstate carriers, resulting in fair rates and service for shippers. Regarding the particular sections of the Code and regulations relied upon by Defendant Carras, which designate certain territories for carriers, the class especially benefitted is all carriers who are competing in a given freight-hauling business. Defendant Carras can hardly be

considered a part of this class; it makes no difference to him as a shipper whether Plaintiff Hull and Smith or another horse van carrier hauls his horses. There is no indication of legislative intent to create any private federal right in favor of shippers like Defendant Carras; in fact, all enforcement power of the Code is specifically reserved to the Commission. Finally, as decided by Honorable James Harvey (Petitioner's Exhibit C), on Defendant-Appellee's removal of claim to federal court, the claim pled here by Plaintiff Hull and Smith is solely a state cause of action; it would be inappropriate to allow Defendant Carras affirmative relief based solely on federal law. It must therefore follow that Mr. Carras does not have standing to raise Respondent's territorial ICC authority as an affirmative defense.

(3) WAS THE MICHIGAN COURT OF APPEALS DECISION THAT RESPONDENT HULL AND SMITH HORSE VANS, INC. WAS NOT BARRED FROM COLLECTING THEIR CHARGE FOR HAULING PETITIONER CARRAS' HORSES FOR HIM IN CONFLICT WITH THE DECISION OF A FEDERAL COURT OF APPEALS?

At Page 7 of his Petition, Mr. Carras cites three U.S. Court of Appeals decisions which, he claims, hold that a common carrier cannot recover "charges" when there is "illegal carriage off route". According to Petitioner, these decisions are all in conflict with the Michigan Court of Appeals decision at issue here (Petition, Appendix A).

The cases cited by Petitioner are undercharge cases, where the seminal issue

was whether the carrier could recover the difference between the original tariff rate charged and paid by the shipper and a new, higher rate filed by the carrier before the services were completed, where the transfer was outside the carrier's authorized route. The holding in each case was that the carrier could not recover this difference, or "undercharge"; however, no case holds that such a carrier is obligated to haul a shipper's freight for nothing. As such NAJAD, FRY TRUCKING CO., and MARS EXPRESS, INC. (all cited by Petitioner Carras) are inapposite to the present case.

The Michigan Court of Appeals, as did Judge Penzien of the Bay County Circuit Court, cited ETS-HOKIN and GALVIN vs. MAAS TRANSPORT, INC., 380 F.2d 258(CA 8, 1967). Petitioner Carras has taken issue

with reliance upon this decision throughout this case; in fact, in his brief on appeal to the Michigan Supreme Court, Carras states flatly that the Michigan Court of Appeals "simply completely misunderstood the 8th Circuit decision".

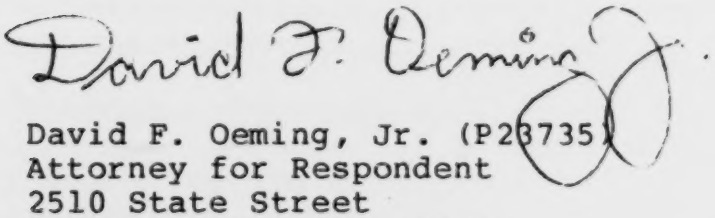
There is no "conflict" between the instant Michigan Court of Appeals decision, which relies in part on ETS-HOKIN and GALVIN, supra, and the federal appellate court decisions cited by Petitioner Carras. The essential holding of NYAD, FRY TRUCKING CO., and MARS EXPRESS, INC, is that the carrier in each may be paid according to the tariff on record, not a later, or different rate. The basic holding (on this issue) of the Michigan Court of Appeals is that Respondent Hull and Smith may recover its reasonable charge for

hauling Petitioner's horses for him as measured by the applicable tariff. No other, or different, hauling rate was at issue before the Michigan courts; thus, the conflict alleged by Petitioner Carras simply does not exist.

CONCLUSION

Petitioner Carras did not seek a final judgment from the Michigan Supreme Court, does not have standing to assert ICC regulation violations as a defense to this state court collection action, and has not demonstrated a conflict between this Michigan Court of Appeals decision, and any federal appellate court decision. His petition should be denied, with costs to Respondent Hull and Smith Horse Vans, Inc.

Respectfully submitted,



David F. Oeming, Jr. (P23735)
Attorney for Respondent
2510 State Street
Saginaw, Michigan 48602
Phone: (517) 799-2660

APPENDIX A

RULE 7.313 MOTIONS IN SUPREME COURT

(A) What to File. To have a motion heard, a party must file with the clerk:

1. a motion stating briefly but distinctly the grounds on which it is based and the relief required;

2. an affidavit supporting any allegations of fact in the motion;

3. a notice that the motion will be heard ona Tuesday at least 7 days after the motion is filed;

4. the fee provided by MCR 7.319(B)(7)(c); and

5. proof that the motion and supporting papers were served on the opposing party.

Eight copies of the motion must be filed, except only 2 copies need be filed of a motion to extend time, to place a case on or withdraw a case from the session calendar, or for oral argument. The attorney must sign the motion. By filing a motion for immediate consideration, a party may obtain an earlier hearing on the motion.

(E) Motion for Reconsideration. To move for reconsideration of a Court order, a party must file the items required by subrule(A) within 21 days after the date of certification of the order. The clerk shall refuse to accept for filing any motion for

reconsideration of an order denying a motion for reconsideration. The filing of a motion for reconsideration does not stay the effect of the order addressed in the motion.